

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-1449

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT T. LOEWY,

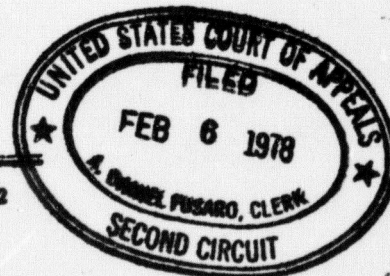
Appellant.

*On Appeal From The United States District
Court For The Southern District of New York*

APPELLANT'S APPENDIX

JERALD ROSENTHAL
Attorney for Appellant
310 Warren Street
Brooklyn, N.Y. 11201
(212) 625-2290

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358



B
P/S

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>
Docket Entries	1a
Indictment	3a
Judgment and Probation/Commitment Order	20a
Charges of the Court	21a

LOCKET ENTRIES (Pages 1a-2a)

1a

U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	U.S. vs. LOEWY, ROBERT T.	06-02-77 0411 02
Case No. 0852	(LAST, FIRST, MIDDLE)	06
U.S. WILL/SECTION	OFFENSES CHARGED	
18:371	Consp. to fraudulently sell securities	
15:77(a), 77x	Fraudulent sale of securities	
18:1505	Obstruction of justice	

10/21

KEY DATES & INTERVALS		INDICTMENT		ARRAIGNMENT		TRIAL	
ARREST or U.S. Custody Began	High Risk Date	Information ☐	6-2-77	1st Plea	6-9-77	Trial Set For	Var Use
U.S. Release	Indict. Waived ☐	Superseding ☐	☐	Final Plea	6-9-77	Trial Begun	9-15-77
First Appearance	In Charging District	Indict/Info ☐				Trial Ended	9-21-77

MAGISTRATE		OUTCOME:	
DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.
		PRELIMINARY EXAMINATION OR REMOVAL HEARING	
		WAVED ☐ NOT WAVED ☐	
		INTERVENING INDICTMENT ☐	
		Tape Number	
			DISMISSED ☐
			HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐
			HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW ☐

Att. Assigned to Acc. **Paul Vizcarra, Jr.** 791-1949 260

ATTORNEYS Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Matthew L. Byrne
27 E. 39th St.
New York, N.Y. 10016
Tel: 689-1811

B. Loewy-01, Becker-03, DeFilippo-04, Agostino-05, Rotkman-06		EXCLUDABLE DELAY	
DATE	PROCEEDINGS	(a)	(b)
6-9-77	ad Indictment.....Owen, J.		
6-13-77	Deft. (atty. Matthew L. Byrne present) pleads not guilty. Bail fixed at \$10,000 unsecured PRB. Bail limits extended to continental U.S. upon notice to PSA. Ordered F/P. Case assigned to Brieant, J. for all purposes.....Brieant, J.		
6-9-77	Filed Notice of Appearance, of Matthew L. Byrne/		
6-22-77	Filed APPEARANCE BOND in the sum of \$10,000/	3 6-22	19
7-8-77	Deft is exempted under the speedy trial rule from June 9th under further order of the court under Sec. b-7. BRIEANT, J.	3 7-11	19
7-11-77	Filed Deft's NOTICE OF MOTION for an order to inspect and copy those intems hereinafter. Affidavit of Matthew L. Byrne in support of the motion attached.		
7-14-77	Deft w/a/p, Pre-trial conference held. Deft's exemptions under speedy trial rules terminated. Time under speedy trial rules resumed as of today. Motions 7-14-77 at 9:30 AM BRIEANT, J.	3 7-14	19
	Deft w/a/p, motions argued. Decision reserved. Sent. G under Speedy trial rules. Time Stopped. BRIEANT, J.		

Cont'd on Page 2

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW, IN SECTION V, ANY DOCUMENTS OR EXHIBITS

DATE	DOCUMENT NO.	V. PROCEEDINGS (continued)	DATE	DOCUMENT NO.	V. PROCEEDINGS (continued)
8-3-77		Filed transcript of record of proceedings, dated 6-8-77			
8-3-77		Filed transcript of record of proceedings, dated 7-8-77			
8-3-77		Filed transcript of record of proceedings, dated 7-14-77			
8-3-77		Filed transcript of record of proceedings, dated 7-15-77			
9-2-77		Filed Deft's NOTICE OF MOTION AND SUPPLEMENTAL AFFIDAVIT of Daniel P. Hollman for an order dismissing the indictment.			
9-6-77		Filed AFFIDAVIT of Paul Viscarrondo, Jr., in opposition to the motions filed by the deft to dismiss this indictment.			
9-6-77		Filed BILL OF PARTICULARS by the Govt'.			
9-6-77		Filed AFFIDAVIT of Harry L. Garmansky from the Division of Enforcement in the N.Y. Regional Office of the U.S. Sec. and Exchange Commission.			
9-6-77		Filed Govt's MEMORANDUM OF LAW in opposition to the deft's motion to dismiss the indictment.			
9-7-77		Filed MEMORANDUM & ORDER ... The motions are denied. BRIEANT, J. N/N.			
9-14-77		Filed Govt's PROPOSED examination of Prospective Jurors.			
9-21-77		Filed Govt's REQUEST TO CHARGE.			
9-15-77		Deft w/s/p Jury Trial begun.			
9-16-77		Trial Cont'd.			
9-19-77		Trial Cont'd.			
9-20-77		Trial Cont'd.			
9-21-77		Trial cont'd & concluded. Jury verdict Guilty on Ct. 12. Mistrial as to Cts. 1-11. In the interest of Justice deft does not have to be retried within 60 days. Sect. T. of the Speedy Trial Act. Bail cont'd. P.S.I. ordered. Sentence 10-14-77. BRIEANT, J.			
10-14-77		Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - The deft is hereby committed to the custody of the Atty Gen for impr for a period of ONE (1) YEAR and ONE (1) DAY on count 12. Deft cont'd on present bail until he posts bail pending appeal fixed in the amount of \$10,000.00 Unsecurer Personal Recognizance Bond. BRIEANT, J. (all copies issued).			
10-21-77		Filed deft. notice of appeal to the U.S.C.A. 2nd Circuit from the Judgment of conviction entered on 10-14-77. Mailed Copies.			

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

A TRUE COPY

RAYMOND F. BURCHARDT, Clerk

By

R. F. Burchardt
Clerk

INDICTMENT (Pages 3a-19a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

vs.

BENJAMIN W. LOEWY, ROBERT T.
LOEWY, ALAN S. BECKER, JOSEPH
L. DE FILIPPO, VINCENT J.
AGOSTINO, and S. JACK ROTHMAN,

Defendants.

-----X

COUNT ONE

The Grand Jury charges:

Introduction

1. At all times relevant to this Indictment, the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY were officers of Corporate Advisory Council, or Cox-Ad-Co., Inc., with offices located at 250 West 57th Street, New York, New York.

2. At all times relevant to this Indictment, the defendant ALAN S. BECKER was president of Ecological Manufacturing Corporation ("EMC"). EMC was organized primarily to manufacture and sell a relatively non-toxic chemical replacement for DDT. EMC's offices were located at 5401 Tonnele Avenue, North Bergen, New Jersey, until about August, 1972, when they were moved to 250 West 57th Street, New York, New York.

3. At all times relevant to this Indictment, the defendant JOSEPH L. DE FILIPPO was president of Nova Equity Ventures, Inc. ("Nova") and of its subsidiary, Horizon Securities,

Inc. ("Horizon"). Horizon was a broker-dealer registered with the United States Securities and Exchange Commission ("SEC"), and had offices located at 295 Madison Avenue, New York, New York.

4. At all times relevant to this Indictment, the defendants VINCENT J. AGOSTINO and S. JACK ROTHMAN were officers of Trans America Transfer Company, stock transfer agents with offices located at One Exchange Place, Jersey City, New Jersey.

5. At all times relevant to this Indictment, Ernest Milchman, named as a co-conspirator but not as a defendant in this Indictment, was an attorney with offices located at 445 Park Avenue, New York, New York.

6. At all times relevant to this Indictment, Stanley Goldfoot, named as a co-conspirator but not as a defendant in this Indictment, was president of Iscoram Corporation, a dummy company incorporated under the laws of the State of New York on or about February 22, 1972, and with offices located at Goldfoot's residence at 400 East 56th Street, New York, New York.

7. At all times relevant to this Indictment, Jack Oxman, named as a co-conspirator but not as a defendant in this Indictment, was a personal friend of the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY.

I. THE CONSPIRACY

8. From on or about December 1, 1970, up to and including the date of the filing of this Indictment, in the

Southern District of New York and elsewhere, BENJAMIN W. LOEWY, ROBERT T. LOEWY, ALAN S. BECKER, JOSEPH L. DE FILIPPO, VINCENT J. AGOSTINO and S. JACK ROTHMAN, the defendants, and Ernest Milchman, Stanley Goldfoot and Jack Orman, named as co-conspirators but not as defendants in this Indictment, and other persons to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of the Securities Act of 1933, Title 15, United States Code, Sections 77q(a) and 77x.

II. THE OBJECTS OF THE CONSPIRACY

9. The principal objects of the conspiracy were to pay secret compensation and commissions to the defendant JOSEPH L. DE FILIPPO and Horizon for selling the common stock of EMC to the public and to make secret payments to the defendants BENJAMIN W. LOEWY, ROBERT T. LOEWY, VINCENT J. AGOSTINO and S. JACK ROTHMAN, and co-conspirator Ernest Milchman, from the proceeds of the public sale of EMC common stock. The aforesaid secret compensation, commissions and payments were not disclosed in the Offering Circular filed with the SEC and given to prospective purchasers of EMC common stock.

10. It was a further part of said conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly, in the offer and sale of securities, to wit,

the common stock of EMC, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, would and did directly and indirectly (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engage in transactions, practices and courses of business which operated and would operate as a fraud and deceit upon the purchasers of the common stock of EMC and upon any and all persons to whom the said defendants and co-conspirators, directly and indirectly, would attempt to sell the aforementioned securities.

III. THE MEANS BY WHICH THE CON-
SPIRACY WAS CARRIED OUT

11. Among the means by which the defendants and their co-conspirators would and did carry out the said conspiracy were the following:

(a) In or about December, 1970, the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY agreed to arrange a public offering of the common stock of the predecessor company of EMC, Ecological Manufacturing Associates, Inc., in order to raise a total of \$500,000, and in return, the defendant ALAN S. BECKER agreed, among other things, (1) to pay to the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY a total of approximately \$14,000 before the effective date of said public offering; (2) to pay to the defendants BENJAMIN W. LOEWY and

ROBERT T. LOEWY a total of approximately \$25,000 on the closing of said public offering; and (3) to enter into a management consulting contract with Corporate Advisory Council for approximately three years, commencing on the closing of said public offering, pursuant to which Corporate Advisory Council would receive approximately \$25,000 per year.

(b) In or about June, 1971, the defendant BENJAMIN W. LOEWY and co-conspirator Jack Oxman agreed that the defendant BENJAMIN W. LOEWY could use Oxman's name as that of the finder for the underwriting of the EMC public offering. The defendant BENJAMIN W. LOEWY and co-conspirator Oxman further agreed that Oxman would keep ten per cent of the fee he would receive for purportedly being the finder and secretly give the remainder of said fee to the defendant BENJAMIN W. LOEWY.

(c) In or about July, 1971, the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY retained co-conspirator Ernest Milchman to be attorney for the underwriter for the public offering of the common stock of EMC.

(d) In or about April, 1972, the defendants VINCENT J. AGOSTINO and S. JACK ROTHMAN introduced Horizon to co-conspirator Ernest Milchman as a potential underwriter for the public offering of the common stock of EMC. The defendants AGOSTINO and ROTHMAN asked co-conspirator Milchman to have Horizon paid a secret ten percent commission, or approximately \$50,000, for doing the underwriting, in addition to the ten

percent commission plus expenses it would receive as set forth in the Offering Circular for the public offering. With the approval of the defendants BENJAMIN W. LOEWY, ROBERT T. LOEWY and ALAN S. BECKER, co-conspirator Milchman agreed to the aforesaid extra \$50,000 payment requested by the defendants AGOSTINO and ROTHMAN. It was thereafter decided that the aforesaid extra \$50,000 payment would be divided among certain persons who had helped arrange the EMC public offering, including the defendants AGOSTINO, ROTHMAN and JOSEPH L. DE FILIPPO, and co-conspirator Milchman.

(e) In or about April, 1972, the defendants BENJAMIN W. LOEWY, ROBERT T. LOEWY and ALAN S. BECKER, and co-conspirator Ernest Milchman, in order to induce the defendant JOSEPH L. DE FILIPPO and Horizon to underwrite the EMC public offering, promised the defendant DE FILIPPO that the market in EMC common stock would be supported after the close of the public offering at a higher price than the \$2.50 per share at which the stock was to be sold during the public offering. Such after-market support would benefit Horizon and its customers that purchased EMC stock during the public offering.

(f) The defendants BENJAMIN W. LOEWY, ROBERT T. LOEWY, ALAN S. BECKER and JOSEPH L. DE FILIPPO caused an offering Circular to be filed with the SEC and to become effective on May 25, 1972, which stated the terms and conditions, including compensation and commissions to be paid to the

underwriter, under which 200,000 shares of the common stock of EMC would be sold to the public at \$2.50 per share. The Offering Circular contained the following materially untrue statements and omissions, among others:

(1) The Offering Circular did not disclose the additional compensation that the defendants VINCENT J. AGOSTINO and S. JACK ROTHMAN had arranged through co-conspirator Milchman to pay to the defendant DE FILIPPO for agreeing to underwrite the public offering, nor the after-market support that had been promised to the defendant DE FILIPPO for agreeing to underwrite the public offering.

(2) The Offering Circular contained a section entitled "Use of Proceeds" that purported to set forth how EMC proposed to spend the money it would receive from the public offering. It was not disclosed in that section, nor in any other place in the Offering Circular, that the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY would receive approximately \$25,000 upon the closing of the public offering and, through Corporate Advisory Council, approximately \$25,000 per year for three years as management consultants; that approximately \$50,000 would be divided among certain persons who had helped arrange the EMC public offering; or that the after-market in EMC stock was to be supported.

(3) The Offering Circular stated that "Jack Oxman, an unaffiliated finder will be paid a finder's fee of . . . up to . . . \$3000." The Offering Circular did not disclose that co-conspirator Oxman was to give ninety per cent of the finder's fee to the defendant BENJAMIN W. LOEWY.

(g) On or about June 11 and July 17, 1972, the public offering of the common stock of EMC closed, with all 200,000 shares that had been offered to the public having been sold. In accordance with the arrangements described above, on or

about July 17, 1972, the defendant ALAN S. BECKER paid to the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY \$25,000 from the proceeds of the EMC public offering.

(h) In accordance with the arrangements described above, on or about July 17, 1972, the defendant ALAN S. BECKER caused \$3000 from the proceeds of the EMC public offering to be given to co-conspirator Jack Oxman, and on or about July 27, 1972, co-conspirator Oxman sent a check in the amount of \$2700 to Corporate ADvisory Council.

(i) In accordance with the plan to support the after-market in EMC stock described above, from on or about July 17, 1972 to on or about July 24, 1972, the defendants BENJAMIN W. LOEWY, ROBERT T. LOEWY and ALAN S. BECKER, and co-conspirator, Stanley Goldfoot, arranged for \$50,000 from the proceeds of the EMC public offering to be transferred to the defendant JOSEPH L. DE FILIPPO and Horizon in the form of a loan from Iscoram Corporation to Nova.

(j) In accordance with the arrangements described above, on or about July 31, 1972 and on or about August 31, 1972, the defendant ALAN S. BECKER paid the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY \$2100 from the proceeds of the EMC public offering as monthly payments under the management consulting contract between EMC and Corporate Advisory Council.

(k) In accordance with the plan described above, to divide \$50,000 among certain persons who had helped arrange the EMC public offering, on or about August 17, 1972, the defendant ALAN S. BECKER and co-conspirator Ernest Milchman

caused EMC to purchase \$50,000 in treasury notes with proceeds from the EMC public offering. On or about September 6, 1972, the aforesaid treasury notes, which were in bearer form, were delivered to co-conspirator Milchman.

IV. OVERT ACTS

12. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York, and elsewhere:

(a) From on or about May 25, 1972 to on or about July 17, 1972, the defendant JOSEPH L. DE FILIPPO sold and cause to be sold shares of EMC to the public.

(b) On or about July 17, 1972, the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY negotiated or caused to be negotiated a check, drawn on the account of EMC in the amount of \$25,000 and payable to Cor-Ad-Co., Inc.

(c) On or about July 24, 1972, the defendant BENJAMIN W. LOEWY gave a check, drawn on the account of Iscoram Corporation in the amount of \$50,000 and payable to Horizon Securities, Inc., to the defendant JOSEPH L. DE FILIPPO at 295 Madison Avenue, New York, New York.

(d) On or about August 4, 1972, the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY negotiated or caused to be negotiated a check drawn on the account of Jack Oxman in the amount of \$2700 and payable to Corporate Advisory Council.

(e) On or about July 31, 1972, the defendants

BENJAMIN W. LOEWY and ROBERT T. LOEWY negotiated or caused to be negotiated a check, drawn on the account of EMC in the amount of \$2100 and payable to Corporate Advisory Council.

(f) On or about August 31, 1972, the defendants BENJAMIN W. LOEWY and ROBERT T. LOEWY negotiated or caused to be negotiated a check, drawn on the account of EMC in the amount of \$2100 and payable to Corporate Advisory Council.

(g) On or about August 6, 1972 the defendant ALAN S. BECKER sent or caused to be sent a check, drawn on the account of EMC in the amount of \$50,357, to Steiner, Rouse & Co., Inc., 19 Rector Street, New York, New York, for the purchase of treasury notes.

(h) On or about September 6, 1972, co-conspirator Ernest Milchman had delivered to him at 200 Park Avenue, New York, New York, \$50,000 in treasury notes in bearer form.

(i) Each of the mailings alleged in Counts Two through Eleven of this Indictment are repeated and realleged herein as overt acts as if fully set forth herein.

(Title 18, United States Code, Section 371.)

COUNTS TWO THROUGH ELEVEN

The Grand Jury further charges:

1. From in or about April, 1972, to in or about September, 1972, in the Southern District of New York, BENJAMIN W. LOEWY, ROBERT T. LOEWY, ALAN S. BECKER, JOSEPH L. DE FILIPPO, VINCENT J. AGOSTINO and S. JACK ROTHMAN, the defendants, and other persons to the Grand Jury known and

unknown, unlawfully, wilfully and knowingly, in the offer and sale of securities, to wit, the common stock of Ecological Manufacturing Corporation ("EMC"), by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, (a) did employ devices, schemes and artifices to defraud; (b) did obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) did engage in transactions, practices and courses of business which would operate as a fraud and deceit upon purchasers of said securities.

2. The allegations contained in Count One of this Indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which said defendants committed the offenses charged in Counts Two through Eleven.

3. On or about the dates hereinafter stated, in the Southern District of New York, BENJAMIN W. LOEWY, ROBERT T. LOEWY, ALAN S. BECKER, JOSEPH L. DE FILIPPO, VINCENT J. AGOSTINO and S. JACK ROTHMAN, the defendants, and other persons to the Grand Jury known and unknown unlawfully, wilfully and knowingly, and in furtherance of the scheme to defraud set forth in Paragraphs 1 and 2 of Counts Two through Eleven, did use and cause to be used means and instruments of transportation and communication in interstate commerce and the mails by sending and

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>ADDRESS</u>	<u>MATTER</u>
2	June 29, 1972	George Nestely 2 Sabo Court East Patterson, N.J.	Confirmation for 300 shares of EMC
3	June 29, 1972	Lloyd Yentes 36 Van Riper Ave. East Patterson, NJ 07407	Confirmation for 3000 shares of EMC
4	July 3, 1972	Joseph Long, Sr. 134 Riverdale Rd. LIVERPOOL, N.J. 13088	Confirmation for 1000 shares of EMC
5	July 6, 1972	Robert Kagan 199-45 22nd Ave. Whitestone, NY	Confirmation for 100 shares of EMC
6	July 6, 1972	Anthony Cucheriale 1136 Jefferson Ave. Utica, NY	Confirmation for 500 shares of EMC
7	July 6, 1972	George Shapiro 1427 Amsterdam Ave. New York, NY	Confirmation for 500 shares of EMC
8	July 7, 1972	Emanuel Kanner 15-52 215th St. Bayside, NY 11360	Confirmation for 100 shares of EMC
9	July 7, 1972	David S. Opat 940 Garrison Ave. Teaneck, NJ 07666	Confirmation for 100 shares of EMC
10	July 11, 1972	Sam Kilberg 374 Willow Drive Union, NJ 07083	Confirmation for 1000 shares of EMC
11	July 11, 1972	Dr. John Merole 212 David Drive No. Syracuse, NY	Confirmation for 1000 shares of EMC

(Title 15, United States Code, Sections 77q(a) and 77x;
Title 18, United States Code, Section 2.)

COUNT TWELVE

The Grand Jury further charges:

from in or about September, 1972, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, BENJAMIN W. LOEWY, ROBERT T. LOEWY, ALAN S. BECKER, and JOSEPH L. DE FILIPPO, the defendants, and other persons to the Grand Jury known and unknown, unlawfully, wilfully and knowingly, did, corruptly and by threats and force and by threatening letters and communications, endeavor to influence, intimidate and impede witnesses in a proceeding pending before an agency of the United States, to wit, the Securities and Exchange Commission, and did, corruptly and by threats and force and by threatening letters and communications, influence, obstruct and impede and endeavor to influence, obstruct and impede the due and proper administration of the law, to wit, the federal securities laws and related statutes, under which a proceeding was then being had before an agency of the United States, to wit, the Securities and Exchange Commission.

(Title 18, United States Code, Sections 1505 and 2.)

COUNT THIRTEEN

The Grand Jury further charges:

1. On or about the 22nd day of March, 1977, in the Southern District of New York, VINCENT J. AGOSTINO, the defendant, having duly taken an oath as a witness that he would testify truly before

a Grand Jury of the United States, duly impaneled and sworn in the United States District Court for the Southern District of New York and inquiring into violations of federal law, unlawfully, wilfully and knowingly and contrary to his oath did make false material declarations to the Grand Jury.

2. At that time and place, the Grand Jury was conducting an investigation into possible violations of United States Laws, including, among others, laws prohibiting (a) conspiracy to commit any offense against the United States (Title 18, United States Code, Section 371) and (b) fraud in the offer and sale of securities (Title 15, United States Code, Sections 77q(a) and 77x), to determine whether any persons violated these and related statutes in connection with the offer and sale of the common stock of Ecological Manufacturing Corporation ("EMC").

3. It was material to that investigation to determine whether payments were made or planned from the proceeds of the public offering of the common stock of EMC that were not disclosed in the Offering Circular for said public offering; and the manner in which said payments were made or were to be made.

4. At the time and place aforesaid, VINCENT J. AGOSTINO, the defendant, appearing as a witness before the Grand Jury, testified falsely under oath with respect to the aforesaid material matters as follows:

Q: Did you ever hear from anybody how those Treasury bills were supposed to be divided?

A: No.

Q: Did you ever had anybody say that they were supposed to be divided among various persons?

A: No. I didn't know they existed, I said, until I had come back.

Q: Well, after you came back did you ever hear it?

A: No.

Q: Did you ever discuss them with Milchman?

A: No.

Q: With Joseph DeFillipo?

A: No.

Q: With Joseph DeFillipo?

A: No.

(Title 18, United States Code, Section 1623).

COUNT FOURTEEN

The Grand Jury further charges:

1. On or about the 22nd day of March, 1977, in the Southern District of New York, S. JACK ROTHMAN, the defendant, having duly taken an oath as a witness that he would testify truly before a Grand Jury of the United States, duly impaneled and sworn in the United States District Court for the Southern District of New York and inquiring into violations of federal law, unlawfully, wilfully and knowingly and contrary to his oath did make false material declarations to the Grand Jury.

2. At that time and place, the Grand Jury was conducting an investigation into possible violations of United States laws, including, among others, laws prohibiting (a) conspiracy to commit

any offense against the United States (Title 18, United States Code, Section 371) and (b) fraud in the offer and sale of securities (Title 15, United States Code, Sections 77q(a) and 77x), to determine whether any persons violated these and related statutes in connection with the offer and sale of the common stock of Ecological Manufacturing Corporation ("EMC").

3. It was material to that investigation to determine whether payments were made or planned from the proceeds of the public offering of the common stock of EMC that were not disclosed in the Offering Circular for said public offering; the persons who received or were to receive said payments; and the manner in which said payments were made or were to be made.

4. At the time and place aforesaid, S. JACK ROTHMAN, the defendant, appearing as a witness before the Grand Jury, testified falsely under oath with respect to the aforesaid material matters as follows:

* * * * *

De Fillipo or any other people?

A: No. I don't ever recall ever being told that.

Q: At any time?

A: At any time I don't recall ever being told that.

Q: Were you or your company supposed to receive part of those \$50,000 in treasury bills?

A: No, my company was not to receive anything out of that.

Q: Were you or Mr. Agostino to receive anything out of those treasury bills?

A: No, we weren't.

Q: Now, --

A: In answer to your last question, I don't recall Mr. Milchman ever saying that to me or anyone else. No one ever came out and said, Mr. Rothman, your company is going to get part of the \$50,000 worth of Treasury notes. I don't recall anybody ever saying that to me at all.

Q: Do you recall anything --

A: Not that I would have been adverse to getting any money, but I wasn't.

* * *

hinting that you would get part of it?

A: No, I don't. I don't recall anyone saying that to me. As far as I assumed, the \$50,000 in Treasury notes Mr. Milchman put away was to be held for the company and to stop the company from spending so much money, because Ecological was spending money like crazy.

* * * * *

Q: Were you ever aware of any discussion as to how that \$50,000 was to be divided up?

A: No, I don't recall.

(Title 18, United States Code, Section 1623.)

s/John J. King
FOREMAN

s/Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

JUDGMENT AND PROBATION/COMMITMENT ORDER

- - - - - X

SAME TITLE

- - - - - X

In the presence of the attorney for the government the defendant appeared in person on this date October 14, 1977, with counsel Matthew Byrne.

Pleaded not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense(s) of obstruction of justice. (Title 18, U.S. Code, Sections 1505 and 2.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary is shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is ONE (1) YEAR and ONE (1) DAY on count 12.

Defendant continued on present bail until he posts bail pending appeal fixed in the amount of \$10,000.00, Unsecured Personal Recognizance

* * * * *

21a
CHARGES OF THE COURT (21a-110a)

424

1 mbbg

2 (In open court, jury present.)

3 CHARGE OF THE COURT

USA v. Loewy (Brieant, J.)

77 Cr. 411

9/20/77

5 THE COURT: Miss Moats and members of the
6 jury.

7 We are now at that stage in the trial where
8 you will soon undertake your final function as jurors, and
9 here you perform one of the most sacred obligations of
10 citizenship and that is acting as ministers of justice; and
11 you are to discharge this final duty in an attitude of
12 complete fairness and impartiality. As I emphasized when
13 you were first selected, without bias or prejudice for or
14 against the Government or the defendant as parties to
15 this controversy.

16 Let me state the fact that the Government is
17 a party entitles it to no greater consideration than that
18 accorded to any other party to litigation. By the same
19 token, it is entitled to no less consideration. All
20 parties, individuals and Government alike, stand as equals
21 before the bar of justice in this court.

22 Your final role here is to decide and pass
23 upon the fact issues in this case. You are the sole and
24 exclusive judges of the fact. You determine the weight
25 of the evidence. You appraise or decide the credibility

1 mbbg

2 or truthfulness of the witnesses, and you draw the
3 reasonable inferences on conclusions from the evidence
4 and you resolve such conflicts as there may be in the
5 evidence. I shall later tell you how you consider the
6 credibility of witnesses.

7 My final function is to instruct you as to the
8 law, and it's your duty to accept these instructions as to
9 the law and then to apply them to the facts as you find
10 them to be. Now you are not to consider any one instruc-
11 tion which I give you alone as stating the law. Rather
12 you must consider all of my instructions taken together as
13 a whole.

14 With respect to any fact matter, it's your
15 recollection and yours alone that controls. Anything
16 that the lawyers either for the Government or the defendant
17 may have said with respect to matters in evidence, whether
18 during the trial, in a question, in argument, or in
19 summations, is not to be substituted for your own
20 recollection of the evidence. And so too anything that I
21 might say during the trial, anything I might refer to
22 during the course of these instructions as to any matter
23 in evidence, is not to be taken in lieu of your own
24 recollection.

25 Now the attorneys not only have their right

1 mbbg

2 but it's their duty to make objections, and to press what-
3 ever legal theories they may have. They are simply
4 performing their duty here; and so please do not assume
5 that I hold any opinion on any matters concerning this
6 case, and please don't reach any conclusion from anything
7 that I may have said or any ruling that I may have made
8 that I may have any attitude or that I may tend to favor
9 one side or the other in the case or that I may have any
10 idea as to how the case ought to be decided. I do not.
11 The factual decisions in this case are yours to make and
12 yours alone.

13 Of course, as I told you earlier when you were
14 selected as jurors, the indictment here itself is not
15 evidence of the crimes charged. Instead, an indictment
16 is merely the procedure or method under our law whereby
17 persons accused of crimes by a grand jury are brought into
18 court to have their case decided by a trial jury such as
19 yourselves. Therefore, the indictment must be given no
20 evidentiary value. It shall be treated by you only as an
21 accusation. It is not evidence or proof of the defendant's
22 guilt and no weight or significance whatsoever is to be
23 given to the fact that an indictment has been returned
24 against the defendant.

25 The defendant has pleaded not guilty and thus

1 mbbg

2 the Government has the burden of proving the charges
3 beyond a reasonable doubt.

4 A defendant does not have to prove his
5 innocence. On the contrary, he is presumed to be innocent
6 of the accusations contained in the indictment. This
7 presumption of innocence was in his favor at the start of
8 the trial, as I believe I also told you when you were
9 selected. It continued in his favor throughout the entire
10 trial, and it's in his favor now, and the presumption of
11 innocence remains in his favor during the course of your
12 deliberations in the jury room, and the presumption of
13 innocence is removed as to a particular count in the
14 indictment only if, and when, you, the jury, are satisfied
15 that the Government has sustained its burden of proving
16 the guilt of the defendant as to that particular count
17 beyond a reasonable doubt; and, of course, unless you are
18 so convinced, you must find him not guilty on that count.

19 Now the question naturally comes up, what is
20 a reasonable doubt? Well, members of the jury, those
21 words almost define themselves. That is a doubt founded
22 on reason arising out of the evidence in the case or a
23 lack of evidence in the case. It's a doubt which a
24 reasonable person has after carefully weighing all the
25 evidence. Reasonable doubt is a doubt that appeals to

1 mbbg

2 your reason, to your judgment, to your common sense, and
3 your experience. It's not caprice or whim or speculation
4 or conjecture or suspicion. It's not an excuse to avoid
5 the performance of an unpleasant duty, and it's not
6 sympathy for a defendant.

7 If, after a fair and impartial consideration
8 of all the evidence, you can candidly and honestly say
9 you are not satisfied of the guilt of the defendant as to
10 a particular point that you are then considering, that
11 you do not have an abiding conviction of the defendant's
12 guilt of that particular count or charge, in sum, if you
13 have such a doubt as would cause you as prudent persons
14 to hesitate before acting in matters of importance to
15 yourselves, then you have a reasonable doubt and in that
16 circumstance, it's your duty to acquit the defendant as to
17 the count that you are then considering.

18 On the other hand, if after such an impartial
19 and fair consideration of all the evidence, you can
20 candidly and honestly say you do have an abiding conviction
21 of the defendant's guilt, such a conviction as you would
22 be willing to act upon in important and weighty matters
23 of the personal affairs of your own life, then you have
24 no reasonable doubt and under those circumstances, it's
25 your duty to convict the defendant as to the count you are

1 mbbg

429

2 then considering.

3 Reasonable doubt doesn't mean a positive
4 certainty or beyond all possible doubt. If that were the
5 rule, few people, however guilty they might be, would
6 ever be convicted because it's practically impossible for
7 a person to be absolutely, completely convinced of any
8 controverted fact which by its nature is not susceptible
9 of mathematical certainty. For that reason, the law in
10 a criminal case is that it's sufficient if the guilt of
11 a defendant is established beyond a reasonable doubt, not
12 beyond all possible doubt.

13 The indictment in this case, members of the
14 jury, contains twelve counts, and each count charges a
15 separate crime; and each must be considered separately
16 by you, and you will be asked to give a separate verdict
17 as to each count.

18 The indictment names six defendants in all
19 but only Mr. Robert Loewy is being tried in the case
20 before you; although as I will explain to you shortly in
21 considering his case, you may have to determine the nature
22 of the participation, if any, of others. I must remind
23 you, as I said earlier, that in determining innocence or
24 guilt, you must bear in mind that guilt is personal.
25 Whether the guilt of this defendant on trial before you

mbbg

has been proven beyond a reasonable doubt must be determined separately as to each count in which he is named solely on the evidence presented against him or the lack of such evidence, and not based upon the evidence of the guilt of other persons.

Now for your guidance in considering the evidence you have heard, I must tell you there are two classes of evidence recognized and admitted in courts of justice upon either of which the jurors may find an accused person guilty of a crime. One is called direct evidence, and the other is called circumstantial evidence.

Direct evidence tends to show the fact in issue without need for any other amplification, although of course there is always the question as to whether it's to be believed.

Circumstantial evidence is evidence that tends to show facts from which the fact in issue may reasonably be inferred. It's evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer or conclude that the facts sought to be established are true.

Now there is a traditional example given in the courthouse. Earlier this morning it would have been difficult, looking out the window of this courtroom to be

1 mbbg

2 certain whether it's raining or not. But if you had
3 looked out of the window earlier and you looked down in
4 the street and you saw people passing by in the street
5 having their umbrellas up, and the sun is not shining,
6 you would usually come to the conclusion that it must be
7 raining. You have the direct evidence, the evidence of
8 your own senses. Your eyes tell you that it's cloudy out
9 and the umbrellas are up and that constitutes circumstantial
10 evidence from which you are entitled to conclude by use
11 of your common sense that it must be raining. In other
12 words, circumstantial evidence consists of facts proved
13 from which the jury by a process of reasoning, may reach
14 a decision as to other facts in issue.

15 Circumstantial evidence, if believed, is of
16 no less value than direct evidence, for in either case
17 you must be convinced beyond a reasonable doubt of the
18 guilt of the defendant before he may be convicted of any
19 crime.

20 It's your duty to decide this case on the
21 basis of all the evidence presented in court, both the
22 direct and the circumstantial evidence or the lack of
23 evidence. You are to decide on the basis of the testimony
24 of the witnesses which you believe and the documents or
25 exhibits in evidence and the inferences that you think

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

mbbg

reasonably flow therefrom. In doing so, you are not to indulge in speculation or conjecture or guesswork. In determining what evidence you will accept as true, you must make your own evaluation of the testimony given by each of the witnesses, and determine for yourselves what you believe to be the truth and the degree of weight or significance you choose to give to that testimony. The testimony of a witness may fail to conform with the facts as they occurred because the witness is intentionally telling a falsehood, or because the witness didn't accurately see or hear what he or she is testifying about, or because his recollection of the event is faulty, or because he hasn't expressed himself clearly in giving testimony.

Now, there is no magic formula by which you evaluate testimony. You bring with you into the jury room all the experience and background of your everyday lives. In your everyday affairs, each of you determine for yourselves the reliability of statements made to you by others. The same tests you use in your everyday dealings are the tests which you apply in your deliberations.

You may, of course, consider the interest or lack of interest of any witness in the outcome of the case. A witness who is interested is not necessarily unworthy

1 mbbg

2 of belief but it's a factor or a possible motive which
3 you may consider in determining the weight of credibility
4 to be given to his testimony. You can consider also
5 whether the testimony of a witness is corroborated, that
6 is to say, borne out, by the testimony of others; or by
7 documentary evidence or by exhibits.

8 You may consider the bias or prejudice of a
9 witness, if there be any, and the manner in which the
10 witness gives his testimony on the stand, the appearance
11 and conduct of the witness in giving testimony, and the
12 opportunity the witness had to observe the facts con-
13 cerning which he testifies, and the probability or
14 improbability of the testimony in the light of all the
15 other events in the trial.

16 You may also consider whether a witness had
17 any motive to lie. These are all items to be taken into
18 your consideration in determining the truthfulness and
19 the weight or significance, if any, that you have assigned
20 to that witness' testimony.

21 If such considerations make it appear there is
22 a discrepancy in the testimony, you will have to consider
23 whether this can be reconciled by fitting testimony of
24 the different witnesses and the exhibits together, and
25 if that's not possible, you will then have to determine

1 mbbg

2 what versions you accept as true.

3 Now, several Government witnesses admitted
4 that they were accomplices in the crimes charged against
5 the defendant on trial. In the prosecution of crimes,
6 the Government is often called upon to use witnesses who
7 are, by their own testimony, accomplices in the commission
8 of the alleged crime, and this is particularly so in the
9 case of a conspiracy because conspirators ordinarily
10 don't publicly proclaim their intentions or operate openly,
11 and ordinarily it often happens that only members of the
12 conspiracy have evidence that is relevant to and important
13 to the case. The Government frequently must use such
14 testimony because otherwise it would be difficult or
15 impossible to detect or prosecute wrongdoers.

16 However, the testimony of such an accomplice
17 witness should be weighed with care and viewed with
18 caution. This is not to say that an accomplice is
19 incapable of telling the truth. If the jurors believe he
20 is telling the truth, they can and should accept the fact
21 to which he testified as being true.

22 In determining what weight you will give to
23 the testimony of any witness, and in deciding the
24 credibility or truthfulness of the witness, as I said
25 before, you may use your common sense and you may consider

1 mbbg

2 all the relevant circumstances which I have previously
3 mentioned, and whether his testimony is corroborated or
4 borne out by other exhibits or other testimony.

5 If you find that any witness has willfully
6 testified falsely as to a material fact, you may, but you
7 need not, disregard the entire testimony of that witness
8 on the principle that one who testifies falsely about one
9 material fact may testify falsely about everything, but
10 you are not required to consider such witness as totally
11 unworthy of belief. You accept so much of his testimony
12 as you deem true and you disregard that part that you
13 believe is false, and you jurors are the sole judges of
14 the fact, to determine which of the witnesses you will
15 believe, what portion of their testimony you will accept
16 as true, and what weight or significance you will give
17 to it.

18 The law does not compel a defendant in a
19 criminal case to take the witness stand and testify or to
20 bring forth any evidence whatsoever, and no presumption
21 of guilt may be raised and no adverse inference of any
22 kind whatsoever may be drawn from the failure of the
23 defendant to testify. As stated before, the law never
24 imposes upon a defendant in a criminal case the burden or
25 duty of calling any witnesses or testifying or producing

1 mbbg

2 any evidence; and the fact that he did not do so is not
3 even a matter for your discussion in the course of your
4 deliberations.

5 Now a word about the Securities and Exchange
6 Commission. The Securities and Exchange Commission has
7 been referred to frequently during this trial as the SEC,
8 which is the abbreviation and I may use that expression,
9 the SEC, in my discussions with you today, and want you
10 to understand that that means the United States Securities
11 and Exchange Commission.

12 The SEC is an administrative agency of the
13 United States Government, created by Congress in 1934, and
14 the laws administered by the SEC relate in general to the
15 field of securities and finances. These laws seek to
16 provide protection for the investor and for the public and
17 to assure a fair and honest market in securities, that is,
18 one that will reflect an evaluation of securities in the
19 light of all material and pertinent information.

20 Transactions in securities commonly conducted
21 upon stock exchanges, over-the-counter markets, affect the
22 public interest, and for historical reasons, Congress
23 found it necessary to provide for government control of
24 such matters, including the requirement of filing separate
25 appropriate reports and imposing other requirements

mbbg

437

1 necessary in order to insure the maintenance of a fair
2 and honest market in such transactions; and to protect
3 investors.
4

5 The defendant is charged with violating and
6 with conspiring to violate the Securities Act of 1933.
7 And the Securities Act of 1933 has that title for the
8 simple reason that it relates generally to the offer and
9 sale of securities such as stocks, and it was passed by
10 Congress in 1933 for the purpose of providing full and
11 fair disclosure of the characters of securities sold in
12 interstate and foreign commerce, and through the mails,
13 and to prevent frauds in the sale of such securities and
14 for other purposes.

15 Now securities such as stocks are by their
16 very nature quite different from most other types of goods
17 or merchandise for which there are established public
18 markets. A person wishing to buy an automobile can inspect
19 the automobile, he can determine its quality and the
20 reasonableness of its price as compared to other cars
21 being offered at the same or similar prices, and he can
22 look into it and make an intelligent decision.

23 Now this is not so with respect to a share of
24 stock. A share of stock is a piece of paper, and as a
25 practical matter it's impossible for the average purchaser

1 mbbg

2 of stock to distinguish between securities of little or
3 no value and those offering a reasonable prospect of a
4 satisfactory return on his investment; and it would
5 ordinarily be difficult to do that even by visiting the
6 company's facilities or conducting an inspection of the
7 plant such as you might do if you were buying an automobile
8 from an automobile dealer.

9 And so an investor must therefore rely upon
10 available or other written information about the company,
11 its financial condition, its prospects, the identity and
12 background of its officers and directors, its past
13 operating and financial history, the purpose for which
14 the company intends to use the proceeds of the sale of
15 securities which are offered, and the amount of compensa-
16 tion to be paid out of that money to the persons or firms
17 who are offering the securities to the public on behalf of
18 the company or bringing the stock out for sale.

19 The Securities Act of 1933 provides in
20 substance that before a securities offer to the public,
21 the corporation issuing the security, so-called issuer,
22 EMC or Ecological Manufacturing Corp. in this case, must
23 file a registration statement with the SEC making a full
24 and accurate disclosure of all material facts relating to
25 its affairs; and in cases such as this, where the proposed

mbbg

439

public offering was a relatively small amount of money, Congress authorized the SEC to devise a plan, which it did, whereby a public issue of not over \$500,000 could be made without going through the complex registration procedures so long as the issuer and the underwriter filed with the SEC a simple and more easily prepared statement of its affairs known as an offering circular.

Now two such offering circulars are in evidence in this case, and you may look at them in the jury room. An offering statement includes a factual presentation about the history and finances of the company, as well as copies of reports of accountants, exhibits, and other materials which interested purchasers of the securities of the company can obtain in order to learn about the history and the operations and the prospect and what they intend to do with the money.

The offering circular contains most of the basic information that would be disclosed in a registration statement for a larger issue of stock of more than \$500,000, and here in this case we are concerned with a stock offering which was permitted to be done pursuant to an offering circular.

Now the offering circular must disclose not only all material facts about the company, the issuer,

1 mbbg

2 that is, EMC, Ecological Manufacturing Corp., but also
3 all the essential facts about the terms and conditions of
4 the underwriting agreement by which the stock is brought
5 to market. Among those terms that must be truthfully
6 stated in the offering circular are the net proceeds to
7 the company, that is, how much will the issuing company
8 EMC or Ecological Manufacturing Corp., receive out of the
9 proceeds of the sale after deducting the expenses of
10 selling the issue, namely the underwriter's commissions
11 and other expenses, from the purchase price of \$2.50 per
12 share, and what the company proposes to use the net
13 proceeds for.

14 It's necessary that these commissions and
15 expenses and other material facts be set forth in the
16 offering circular so that the prospective buyer of the
17 stock, a member of the public, will know how much of the
18 proceeds of the sales of the stock the company will
19 actually receive, and he is also entitled to know whether
20 people who are selling the stock are getting an excessive
21 commission that would tend to make them push the stock
22 even if they didn't think it was a good investment. He
23 is entitled to know how the company intends to use the
24 money. These disclosures are required to permit a
25 prospective buyer to exercise an informed judgment in

1 mbbg

2 deciding whether or not to buy that particular stock or
3 some other stock or no stock. If any material information
4 given in the offering circular is untrue, or if any
5 material information is left out or omitted, then the
6 purpose of informing the public about the securities being
7 issued would be frustrated.

8 I have used the word "material." An omitted
9 fact is material if there is a substantial likelihood
10 that a reasonable purchaser or investor would consider it
11 important in deciding whether or not to purchase the stock.
12 The same applies to falsification of fact. Materiality
13 does not require proof of a substantial likelihood that
14 disclosure of the omitted fact would have caused a reasonable
15 investor to change his mind about buying the stock. What
16 the standard does contemplate is a showing of a substantial
17 likelihood that under all the circumstances, the omitted
18 fact or the falsification would have assumed actual
19 significance in the deliberations of the reasonable
20 investor had the truth been completely known.

21 Put another way, there must be a substantial
22 likelihood that the disclosure of the omitted fact or the
23 correction of the falsification would have been viewed
24 by the reasonable investor as having significantly altered
25 the total mix of information made available.

mbbg

442

1
2 Now, as I stated, the company, EMC in this
3 case, is referred to as an issuer of securities and it
4 usually markets or sells stock or securities to the public
5 by selecting an underwriter, in this case Horizon, to
6 make the distribution of securities. Once the securities
7 are sold, members of the public at large who decide to
8 purchase the securities become public shareholders of the
9 company's stock or other securities, and the underwriter
10 transmits the proceeds of sale minus expenses and his fee
11 or the underwriting spread stated in the offering circular,
12 to the company for its intended business use. Such
13 transactions in securities are **affected** with the public
14 interest. For our purposes, an underwriter is a middleman
15 acting for the company in its sale of stock in a public
16 offering, and one may be an underwriter if he was engaged
17 in promoting the sale of the company's stock or otherwise
18 engaged in important steps necessary to the distribution
19 and public sale. According to the exhibits and testimony,
20 it appears, and you may find that Horizon Securities, Inc.
21 was the underwriter of the public offering of the EMC
22 stock, and EMC stock was a security within the meaning
23 of the Securities Act of 1933.

24 Now the philosophy of this Act is one of
25 disclosure, full and fair disclosure of material facts to

1 mbbg

2 prospective buyers of stock. The Act does not empower
3 the SEC to pass upon the merits of securities. The Act's
4 sole function is to require through the filing of a
5 registration statement, or in the case of a smaller
6 offering, the use of an offering circular filed with the
7 SEC, and delivery of a copy to each buyer of stock, and
8 by that means disclosure of all material facts is required
9 to the buyers, which may be necessary to reveal the worth
10 or lack of worth of the securities being offered for sale.

11 Here, it is contended that one of the material
12 matters as to which there was no adequate disclosure was
13 the fact that persons acting in connection with the under-
14 writer, particularly Corporate Advisory Council, and one
15 or more of the other alleged co-conspirators, were to
16 obtain additional monies above and beyond the ordinary
17 stated spread between the underwriting price and the
18 proceeds to the company, as set forth in the offering
19 circular on the front page, and that these additional
20 monies amounted to the sum of \$50,000 being paid to
21 Corporate Advisory Council, \$50,000 being divided among
22 certain others who had helped to arrange the public
23 offering, and \$2700 being paid to Corporate Advisory
24 Council as a secret kickback on a finder's fee stated in
25 the offering circular to have been paid to Mr. Jack Oxman,

mbbg

444

who testified here.

It's also contended that the offering circular did not disclose that the after-market in EMC stock was to be supported by purchases made by persons connected with the underwriting. The jury may find that the compensation to be paid directly or indirectly to underwriters is clearly a material fact which must be disclosed in an offering circular such as this one to prevent it from being misleading.

The jury may also find, if you believe the testimony that these payments were made or agreed to be made, that nondisclosure of such payments to Corporate Advisory Council or to any other of the alleged co-conspirators here rendered the provision in the offering circular concerning the proposed use of proceeds, which you can read when you look at that offering circular, which is in evidence in this case, false and untruthful and in violation of the law.

It's the contention of the Government in this case that the persons named in the indictment conspired with each other to obtain these monies and to prevent disclosure of these payments to the members of the public who bought EMC stock in reliance on the words contained in the offering circular.

mbbg

445

Now the defendant by his plea of not guilty in this case denies all of the Government's contentions as to any and all wrongdoing in the case; and specifically contends that if there was such a conspiracy, he was not a member of it. At this point, I wish to caution you that the fact that one or more of the other alleged conspirators may have pleaded guilty to the same wrongdoing which is charged against Mr. Robert Loewy is not evidence of any kind bearing on his guilt or innocence. As I told you earlier, guilt is personal and you are not to draw any inference against Mr. Robert Loewy by reason of the fact that others of the alleged conspirators have admitted their own personal guilt.

Now I will turn to Count 1 of the indictment, which is the conspiracy count, and I now read you the indictment.

"Count 1. The Grand Jury charges:

"Introduction: 1. At all times relevant to this indictment the defendants Benjamin W. Loewy and Robert T. Loewy were officers of Corporate Advisory Council or Cor-Ad-Co, Inc. with offices located at 250 West 57th Street, New York, New York.

"2. At all times relevant to this indictment, the defendant Alan S. Becker was president of Ecological

mbbg

Manufacturing Corp., EMC. EMC was organized primarily to manufacture and sell a relatively nontoxic chemical replacement for DDT. EMC's offices were located at 5401 Tonnele Avenue, North Bergen, New Jersey, until about August 1972, when they were moved to 250 West 57th Street, New York, New York.

"3. At all times relevant to this indictment, the defendant Joseph L. DeFilippo was president of Nova Equity Ventures, Inc. (Nova) and of its subsidiary Horizon Securities, Inc. (Horizon). Horizon was a broker-dealer registered with the United States Securities and Exchange Commission, (SEC) and had offices located at 295 Madison Avenue, New York, New York.

"4. At all times relevant to this indictment, the defendants Vicent J. Agostino and S. Jack Rothman were officers of Trans American Transfer Company, stock transfer agents with offices located at One Exchange Place, Jersey City, New Jersey.

"5. At all times relevant to this indictment, Ernest Milchman named as a co-conspirator but not as a defendant in this indictment was an attorney with offices located at 445 Park Avenue, New York, New York.

"6. At all times relevant to this indictment, Stanley Goldfoot named as a co-conspirator but not as a

1 mbbg

2 defendant in this indictment, was president of Iscoram
3 Corp., a dummy company incorporated under the laws of the
4 State of New York on or about February 22, 1972, and with
5 offices located at Goldfoot's residence at 400 East 56th
6 Street, New York, New York.

7 "7. At all times relevant to this indictment,
8 Jack Oxman named as a co-conspirator but not as a
9 defendant in this indictment, was a personal friend of
10 the defendants Benjamin W. Loewy and Robert T. Loewy.

11 "1: The Conspiracy.

12 "8. On or about December 1, 1970 up to and
13 including the date of the filing of this indictment, in
14 the Southern District of New York and elsewhere, Benjamin W.
15 Loewy, Robert T. Loewy, Alan S. Becker, Joseph L. DeFilippo,
16 Vincent J. Agostino, and S. Jack Rothman, the defendants,
17 and Ernest Milchman, Stanley Goldfoot, and Jack Oxman,
18 named as co-conspirators, but not as defendants in this
19 indictment, and other persons to the Grand Jury known and
20 unknown, unlawfully, willfully, and knowingly did combine,
21 conspire, confederate, and agree together and with each
22 other, to commit certain offenses against the United States,
23 to wit, violations of the Securities Act of 1933, Title 15,
24 United States Code, Section 77-Q, Subparagraph A, and 77-X.

25 "2: The Objects of the Conspiracy.

mbbg

448

1
2 "9. The principal objects of the conspiracy
3 were to pay secret compensation and commissions to
4 defendant Joseph L. DeFilippo and Horizon for selling the
5 common stock of EMC to the public and to make secret pay-
6 ments to the defendants Benjamin W. Loewy, Robert T. Loewy,
7 Vincent J. Agostino, and S. Jack Rothman, and co-conspirator
8 Ernest Milchman, from the proceeds of the public sale of
9 EMC common stock. The aforesaid secret compensation,
10 commissions and payments, were not disclosed in the
11 offering circular filed with the SEC and given to
12 prospective purchasers of EMC common stock.

13 "10. It was a further part of said conspiracy
14 that the defendants and their co-conspirators unlawfully,
15 willfully and knowingly, in the offer and sale of securities,
16 to wit, the common stock of EMC, by use of means and
17 instruments of transportation and communication in inter-
18 state commerce, and by use of the mails, would and did
19 directly and indirectly, (A), employ devices, schemes, and
20 artifices to defraud; (B), obtain money and property by
21 means of untrue statements of material facts and omissions
22 to state material facts necessary in order to make the
23 statements made in the light of the circumstances under
24 which they were made not misleading; and, (C), engage in
25 transactions, practices, and courses of business, which

mbbg

operated and would operate as a fraud and deceit upon the purchasers of the common stock of EMC and upon any and all persons to whom the said defendants and co-conspirators directly and indirectly would attempt to sell the aforementioned securities.

"3: The Means by Which The Conspiracy Was Carried Out.

"11. Among the means by which the defendants and their co-conspirators would and did carry out the said conspiracy were the following:

"A: In or about December 1970, the defendants Benjamin W. Loewy and Robert T. Loewy agreed to arrange a public offering of the common stock of the predecessor company of EMC, Ecological Manufacturing Associates, Inc., in order to raise a total of \$500,000, and in return the defendant Alan S. Becker agreed, among other things, (1), to pay to the defendants Benjamin W. Loewy and Robert T. Loewy a total of approximately \$14,000 before the effective date of said public offering.

"(2), to pay to the defendants Benjamin W. Loewy and Robert T. Loewy a total of approximately \$25,000 on the closing of said public offering.

"And (3), to enter into a management consulting contract with Corporate Advisory Council for

mbbg

approximately three years commencing on the closing of said public offering pursuant to which Corporate Advisory Council would receive approximately \$25,000 per year.

"B: In or about June 1971, the defendant Benjamin W. Loewy and co-conspirator Jack Oxman agreed that the defendant Benjamin W. Loewy could use Oxman's name as that of the finder for the underwriting of the EMC public offering. The defendant Benjamin W. Loewy and co-conspirator Oxman further agreed that Oxman would keep 10 per cent of the fee he would receive for purportedly being the finder and secretly give the remainder of said fee to the defendant Benjamin W. Loewy.

"C: In or about July 1971, the defendants Benjamin W. Loewy and Robert T. Loewy retained co-conspirator Ernest Milchman to be attorney for the underwriter for the public offering of the common stock of EMC.

"D: In or about April 1972, the defendants Vincent J. Agostino and S. Jack Rothman introduced Horizon to co-conspirator Ernest Milchman as a potential underwriter for the public offering of the common stock of EMC. The defendants Agostino and Rothman asked co-conspirator Milchman to have Horizon paid a secret 10 per cent commission or approximately \$50,000 for doing the underwriting in addition to the 10 per cent commission plus

mbbg

1 expenses it would receive as set forth in the offering
2 circular for the public offering. With the approval of
3 the defendants Benjamin W. Loewy, Robert T. Loewy and
4 Alan S. Becker, co-conspirator Milchman agreed to the
5 aforesaid extra \$50,000 payment requested by the defendants
6 Agostino and Rothman. It was thereafter decided that the
7 aforesaid extra \$50,000 payment would be divided among
8 certain persons who had helped arrange the EMC public
9 offering, including the defendants Agostino, Rothman, and
10 Joseph L. DeFilippo, and co-conspirator Milchman.
11

12 "E: In or about April 1972, the defendants
13 Benjamin W. Loewy, Robert T. Loewy, and Alan S. Becker,
14 and co-conspirator Ernest Milchman, in order to induce
15 the defendant Joseph L. DeFilippo and Horizon to underwrite
16 the EMC public offering, promised the defendant DeFilippo
17 that the market in EMC common stock would be supported
18 after the close of the public offering at a higher price
19 than the two dollars and a half per share at which the
20 stock was to be sold during the public offering. Such
21 after-market support would benefit Horizon and its
22 customers that purchased EMC stock during the public
23 offering.

24 "F: The defendants Benjamin W. Loewy,
25 Robert T. Loewy, Alan S. Becker, and Joseph L. DeFilippo

mbbg

caused an offering circular to be filed with the SEC to become effective on May 25, 1972, which stated the terms and conditions including compensation and commission to be paid to the underwriter under which 200,000 shares of the common stock of EMC would be sold to the public at \$2.50 per share. The offering circular contained the following materially untrue statements and omissions among others:

"(1) The offering circular did not disclose the additional compensation that the defendants Vincent J. Agostino and S. Jack Rothman had arranged through co-conspirator Milchman to pay to the defendant DeFilippo for agreeing to underwrite the public offering. Nor the after-market support that had been promised to the defendant DeFilippo for agreeing to underwrite the public offering.

"(2) The offering circular contained a section entitled "Use of Proceeds" that purported to set forth how EMC proposed to spend the money it would receive from the public offering. It was not disclosed in the offering circular nor in any other place in the offering circular that the defendants Benjamin W. Loewy and Robert T. Loewy would receive approximately \$25,000 upon the closing of the public offering, and through Corporate Advisory Council approximately \$25,000 per year for three years as manage-

1 mbbg
2 ment consultants, and approximately \$50,000 would be
3 divided among certain persons who had helped arrange the
4 EMC public offering, or that the after-market in EMC stock
5 was to be supported.

6 "(3) The offering circular stated that 'Jack
7 Oxman, an unaffiliated finder, will be paid a finder's fee
8 of up to \$3,000.' The offering circular did not disclose
9 that co-conspirator Oxman was to give 90 per cent of the
10 finder's fee to the defendant Benjamin W. Loewy.

11 "G: On or about July 14 and July 17, 1972,
12 the public offering of the common stock of EMC closed, with
13 all 200,000 shares that had been offered to the public
14 having been sold. In accordance with the arrangements
15 described above, on or about July 17, 1972, the defendant
16 Alan S. Becker paid to the defendants Benjamin W. Loewy
17 and Robert T. Loewy \$25,000 from the proceeds of the EMC
18 public offering.

19 "H: In accordance with the arrangements
20 described above, on or about July 17, 1972, the defendant
21 Alan S. Becker caused \$3,000 from the proceeds of the EMC
22 public offering to be given to co-conspirator Jack Oxman,
23 and on or about July 27, 1972, co-conspirator Oxman sent
24 a check in the amount of \$2700 to Corporate Advisory
25 Council.

mbbg

454

"I: In accordance with the plan to support the after-market in EMC stock described above, from on or about July 17, 1972, to on or about July 24, 1972, the defendants Benjamin W. Loewy, Robert T. Loewy, and Alan S. Becker and co-conspirator Stanley Goldfoot arranged for \$50,000 from the proceeds of the EMC public offering to be transferred to the defendant Joseph L. DeFilippo and Horizon in the form of a loan from Iscoram Corp. to Nova.

"J: In accordance with the arrangements described above, on or about July 31, 1972 and on or about August 31, 1972, the defendant Alan S. Becker paid the defendants Benjamin W. Loewy and Robert T. Loewy \$2100 from the proceeds of the EMC public offering as monthly payments under the management consulting contract between EMC and Corporate Advisory Council.

"K: In accordance with the plan described above to divide \$50,000 among certain persons who had helped arrange the EMC public offering, on or about August 17, 1972, the defendant Alan S. Becker and co-conspirator Ernest Milchman caused EMC to purchase \$50,000 in Treasury notes with proceeds from EMC public offering. On or about September 6, 1972, the aforesaid Treasury notes, which were in bearer form, were delivered to co-conspirator Milchman.

mbbg

455

"Overt Acts: 12. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others, were committed in the Southern District of New York and elsewhere."

Now members of the jury, I will read the overt acts a little bit later on in my discussion; and I will leave reading the indictment for the moment, and discuss Count 1 of it, which is the conspiracy count.

The first count of the indictment charges that the defendant conspired to violate Section 77-Q of Title 15 of the United States Code. You don't have to remember those numbers but you have to remember what the conduct is which is prohibited by the particular statutes involved. Now a conspiracy to commit a crime is an entirely different separate offense from the substantive crime that is the objective of the conspiracy. The essence of the crime of conspiracy is an agreement or understanding of two or more persons to violate other laws together. Before you may convict the defendant of the crime of conspiracy, each of the following essential elements must be established to your satisfaction beyond a reasonable doubt. I will now give you the three elements in the crime of conspiracy and this is an essential part of my instructions to you.

First, that sometime between September 1, 1970

1 mbbg

2 and June 2, 1977, an agreement or conspiracy as charged
3 in the indictment for the illegal purposes mentioned in
4 the indictment existed between two or more of the
5 defendants or named co-conspirators.

6 Second element, that this defendant Robert T.
7 Loewy knowingly and willfully associated himself with the
8 conspiracy, that is, that he became a member of it.

9 The third element is that one of the con-
10 spirators knowingly committed at least one of the overt
11 acts set forth in the indictment at or about the time and
12 place alleged.

13 Those are the three essential elements as to
14 Count 1. The other counts have different elements. If
15 the Government fails to establish each of these essential
16 elements as to Robert Loewy beyond a reasonable doubt,
17 then you must find a verdict of not guilty on Count 1 and
18 go on to consider Count 2 and 3 and 4 and so forth. If
19 the Government succeeds in its proof as to all three of
20 those elements beyond a reasonable doubt, then it's your
21 duty to convict him on that count or to find a verdict of
22 guilty.

23 Now what is a conspiracy? Well, a conspiracy
24 is a combination or agreement of two or more persons by
25 concerted action working together to accomplish a criminal

1 mbbg

2 or unlawful purpose, or some purpose not in itself criminal
3 or unlawful, by criminal or unlawful means. In this case,
4 the purpose charged is the violation of the Federal
5 Securities Laws. The gist of the crime of conspiracy is
6 the unlawful combination or agreement to violate the law.
7 Whether or not those persons accomplished what it's
8 alleged they conspired to do is not significant on the
9 issue of guilt or innocence of a conspiracy charge. A
10 conspiracy is sometimes called a partnership in a criminal
11 venture.

12 To establish the existence of a conspiracy,
13 the Government is not required to show that two or more
14 persons sat around a table and entered into a solemn
15 compact orally or in writing stating that they have formed
16 a conspiracy to violate the law, setting forth the
17 details of their plans, the means by which the unlawful
18 project is to be carried out, or the part to be played
19 by each conspirator. Indeed it would be extraordinary
20 if there were such a formal document or specific meeting.
21 Common sense will tell you that when people do, in fact,
22 undertake to enter into a criminal conspiracy, much is
23 left to unexpressed understandings.

24 Conspirators do not usually reduce their
25 agreements to writing or acknowledge them before a notary

1 mbbg

2 public, nor do they publicly broadcast their plans. From
3 its very nature a conspiracy is almost always characterized
4 by secrecy rendering detection difficult. It's sufficient
5 to prove the existence of a conspiracy if two or more
6 persons in any manner impliedly or tacitly come to a
7 common understanding or agreement to violate the law
8 together. Express language or specific words are not
9 required to indicate a set to or an attachment to a
10 conspiracy. In determining whether there has been an un-
11 lawful agreement, you may judge acts and conduct of the
12 alleged conspirators done to carry out an apparent criminal
13 purpose together. You know the old adage, actions speak
14 louder than words, and that is applicable here.

15 Usually the only evidence available is that
16 of disconnected acts which, however, when taken together
17 in connection with each other, may show the existence of
18 a conspiracy to secure a particular result together just
19 as satisfactorily and conclusively as more direct proof
20 might show.

21 Proof concerning the accomplishment of the
22 objects of a conspiracy may be the most persuasive
23 evidence of the existence of the conspiracy itself.
24 Success of the venture, if you believe it was successful,
25 may be significant evidence of the existence of an agree-

mbbg

ment. However, the offense is complete when the unlawful agreement is made, and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the conspirators. The crime of conspiracy is committed whether or not the defendants accomplish successfully what it is alleged they conspired to do.

Now the second element, as I mentioned, is proof of membership in the conspiracy, that is, whether this defendant Robert T. Loewy, participated intentionally in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives. To find that the defendant was a member of the conspiracy, you must find that he knowingly and intentionally and willfully participated therein. Thus mere knowledge of the existence of the conspiracy or mere knowledge of any illegal act on the part of an alleged conspirator, or mere association with one or more conspirators, is not sufficient to establish Robert Loewy's membership in the conspiracy.

Knowledge is a matter of inference from facts proved. It is not necessary that a defendant be fully informed as to all the details of the scope of the conspiracy in order to justify an inference of knowledge on his part. To have guilty knowledge, a defendant need

1 mbbg

2 not know the full extent of the conspiracy, and all of its
3 activities and actors. I want to caution you, however,
4 the mere association with a co-conspirator does not make
5 one a member of the conspiracy. Nor is knowledge without
6 participation sufficient. What is necessary in order to
7 satisfy the second element of this charge is that this
8 defendant participated with knowledge of at least some
9 of the unlawful purposes of the conspiracy and with intent
10 to aid in the accomplishment of those unlawful ends.

11 You will recall that I have said that the
12 defendant must have acted willfully or intentionally as
13 well as knowingly. What do those words mean? They mean
14 deliberately; they mean intentionally. In other words,
15 you must be satisfied beyond a reasonable doubt that the
16 defendant acted with knowledge, consciously, in exercise
17 of his own will, and with a specific criminal intent.
18 Willfully doesn't mean that the defendant in addition to
19 knowing what he was doing must also suppose that he was
20 breaking any particular statute.

21 Now knowledge and intent exist in the mind,
22 and it's not possible to look into a man's mind and tell
23 what went on there sometime ago, and the only way you have
24 for arriving at a decision on these questions is to take
25 into consideration all the facts and circumstances shown

1 mbbg

2 by the evidence, including the exhibits, and to determine
3 from all of those facts and circumstances whether the
4 requisite knowledge and intent were present at the time
5 in question.

6 Direct proof is not necessary. Knowledge and
7 intent may be inferred by you from all of the surrounding
8 circumstances.

9 Now to become a member of or to be a knowing
10 and willful participant in a conspiracy, the defendant
11 must have a stake in the outcome, and he must make the
12 conspiracy something which he wishes to succeed. Your
13 common sense will tell you that in a conspiracy, just as
14 in any business partnership that is perfectly legal,
15 different persons will perform different activities, and
16 one member of the partnership may do all of the thinking
17 and planning, and another member of the partnership may
18 be engaged in purely ministerial or insignificant duties.
19 Guilt is not measured by the relative standing or the
20 nature of the partnership activities entrusted to a
21 particular partner; but before a person may be found to
22 be a knowing and willful member of a conspiracy, it must
23 be shown to your satisfaction beyond a reasonable doubt
24 that he knowingly and willfully acted in furtherance of
25 the illegal purposes charged, and made the venture or made

1 mbbg

2 the conspiracy something which he wished to succeed.

3 Now, as I have already mentioned, the third
4 element of the crime of conspiracy is that an overt act
5 to effect the object of the conspiracy must be committed
6 by at least one of the conspirators in the Southern
7 District of New York.

8 An overt act is any step, action, or conduct
9 which is taken to achieve, accomplish, or further the
10 objective of the conspiracy.

11 Now the purpose of requiring proof of an
12 overt act is that while parties might conspire and agree
13 together to violate the law, then they may change their
14 mind, and they may do nothing to carry it into effect.
15 In that event, it won't constitute a crime. It's only
16 talk. Before conduct may constitute the crime of con-
17 spiracy, after the agreement is reached, there must be an
18 overt act; but the overt act need not be a criminal act
19 nor need it be the crime which is the object of the
20 conspiracy.

21 It's not necessary for the Government to prove
22 that each member of the conspiracy committed or participated
23 in any particular overt act because for these purposes the
24 act of anyone done in the furtherance of the conspiracy
25 becomes the act of all the rest; and the Government need

1 not prove each of the overt acts as alleged in the indict-
2 ment. It's sufficient if at least one is proved in the
3 Southern District of New York which includes all of
4 Manhattan, as I guess you know, at or about the time
5 alleged.
6

7 It need not have occurred at the precise time
8 or place alleged in the indictment; and while the indict-
9 ment charges that the conspiracy existed from on or about
10 December 1, 1970 and continuously thereafter up to and
11 including June 2, 1977, the date of filing of the indict-
12 ment, it's not essential to prove that the conspiracy
13 started and ended on those specific dates. It's sufficient
14 if you find as a fact that the conspiracy was formed and
15 existed for sometime within that period set forth in the
16 indictment, and that at least one of the overt acts was
17 committed in furtherance thereof within that period.

18 When a conspiracy is discovered, either by
19 the SEC or by any other Government entity, then it no
20 longer is deemed to exist for purposes of allegations of
21 this sort.

22 The overt acts charged in this indictment,
23 which I told you a moment ago I would read later on, are
24 as follows: I am now reading the overt acts from the
25 indictment.

1 mbbg

2 "In furtherance of said conspiracy, and to
3 effect the objects thereof, the following overt acts,
4 among others, were committed in the Southern District of
5 New York and elsewhere:

6 "(A). From on or about May 25, 1972 to on or
7 about July 17, 1972, the defendant Joseph L. DeFilippo,
8 sold and caused to be sold shares of EMC to the public.

9 "(B). On or about July 17, 1972, the
10 defendants Benjamin W. Loewy and Robert T. Loewy negotiated
11 or caused to be negotiated a check drawn on the account
12 of EMC in the amount of \$25,000 and payable to Cor-Ad-Co,
13 Inc.

14 "(C). On or about July 24, 1972, defendant
15 Benjamin W. Loewy gave a check drawn on the account of
16 Iscoram Corp. in the amount of \$50,000 and payable to
17 Horizon Securities, Inc. to the defendant Joseph L.
18 DeFilippo at 295 Madison Avenue, New York, New York.

19 "(D). On or about August 4, 1972, the
20 defendants Benjamin W. Loewy and Robert T. Loewy negotiated
21 or caused to be negotiated a check drawn on the account
22 of Jack Oxman in the amount of \$2,700 and payable to
23 Corporate Advisory Council.

24 "(E). On or about July 31, 1972, the
25 defendants Benjamin W. Loewy and Robert T. Loewy negotiated

1 mbbg

2 or caused to be negotiated a check drawn on the account
3 of EMC in the amount of \$2,100 and payable to Corporate
4 Advisory Council.

5 "(F). On or about August 21, 1972, the
6 defendants Benjamin W. Loewy and Robert T. Loewy negotiated
7 or caused to be negotiated a check drawn on the account
8 of EMC in the amount of \$2100 and payable to Corporate
9 Advisory Council.

10 "(G). On or about August 24, 1972, the
11 defendant Alan S. Becker sent or caused to be sent a
12 check drawn on the account of EMC in the amount of
13 \$50,357 to Steiner, Rouse & Company, Inc., 19 Rector
14 Street, New York, New York, for the purchase of Treasury
15 notes.

16 "(H). On or about September 6, 1972, co-
17 conspirator Ernest Milchman had delivered to him at
18 200 Park Avenue, New York, New York \$50,000 in Treasury
19 notes in bearer form.

20 "(I). Each of the mailings alleged in
21 Counts 2, through 11 of this indictment are repeated and
22 realleged herein as overt acts as if fully set forth
23 herein."

24 I will come to the mailings in Counts 2
25 through 11 shortly.

mbbg

Now, Counts 2 through 11, which I will now discuss with you, charge violations of Section 77-Q, Subparagraph A, Title 15 of the United States Code, so-called antifraud provisions of the Securities Act of 1933. As I said to you earlier, you don't have to remember the section numbers. That section reads as follows:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails directly or indirectly, 1, to employ a device, scheme, or artifice to defraud; or, 2, to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of circumstances under which they were made not misleading, or to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

As you can see, the substance of that section is that it's unlawful in the offer or sale of a security such as stock of EMC to employ the United States mails or other means of interstate commerce or interstate communication in furtherance of any fraudulent or deceitful scheme, practice, or course of business; or in any attempt to

mbbg

467

obtain money through material misrepresentations or through omissions of a material fact disclosure of which would be necessary to make the information given not misleading.

As I explained to you earlier, in connection with Count 1, any such conduct is declared to be unlawful by the Securities Act of 1933. False representations mean any representations regarding present or past facts, any opinions expressed or any predictions as to the future, which are not made in good faith or which are made in deliberate disregard of the truth, or which are false.

To convict the defendant on Counts 2 through 11 inclusive, you must find as to the particular count that you are then considering that the following three elements exist, and these are different elements than on Count 1.

First, that the defendant in connection with the sale of EMC stock engaged in a scheme to defraud or to obtain money and property by means of untrue statements of material facts or omission to state material facts necessary in order to make the statements not misleading.

Second, that the defendant did so willfully and knowingly.

And third, that the defendant used or caused

1 mbbg

2 to be used the mails, or in the alternative a means of
3 communication in interstate commerce, in furtherance of
4 the scheme.

5 Also, in the event that you find that the
6 defendant did not actually participate in the acts charged,
7 but that they were committed by others, you may still
8 find him guilty of these substantive Counts 2 through 11
9 under a separate theory referred to as aiding and abetting
10 and I will instruct you concerning this theory later.

11 I will now read to you Counts 2 through 11.

12 "The Grand Jury further charges from in or
13 about April 1972 to in or about September 1972, in the
14 Southern District of New York, Benjamin W. Loewy, Robert T.
15 Loewy, Alan S. Becker, Joseph L. DeFilippo, Vincent J.
16 Agostino, and S. Jack Rothman, the defendants, and other
17 persons to the Grand Jury known and unknown, unlawfully,
18 willfully, and knowingly in the offer and sale of
19 securities, to wit, the common stock of Ecological
20 Manufacturing Corp., (EMC), by the use of means and
21 instruments of transportation and communication in inter-
22 state commerce and by use of the mails, directly and
23 indirectly, (A), did employ devices, schemes, and artifices
24 to defraud;

25 "(B), did obtain money and property by means of

1 mbbg

2 untrue statement of material facts; and omissions to state
3 material facts necessary in order to make the statements
4 made in the light of the circumstances under which they
5 were made not misleading.

6 "And, (C), did engage in transactions, practices,
7 and courses of business which would operate as a fraud
8 and deceit upon purchasers of said securities.

9 "2. The allegations contained in Count 1 of
10 the indictment are repeated and realleged as though fully
11 set forth herein as constituting and describing some of
12 the means by which said defendants committed the offenses
13 charged in Counts 2 through 11. And you will recall I
14 have read Count 1 to you already and I will not read it
15 again at this time.

16 "3. On or about the dates hereinafter stated
17 in the Southern District of New York, Benjamin W. Loewy,
18 Robert T. Loewy, Alan S. Becker, Joseph L. DeFilippo,
19 Vincent J. Agostino and S. Jack Rothman, the defendants
20 and other persons to the Grand Jury known and unknown,
21 unlawfully, willfully and knowingly and in furtherance of
22 the scheme to defraud set forth in Paragraphs 1 and 2 of
23 Counts 2 through 11, did use and cause to be used means
24 and instruments of transportation and communication in
25 interstate commerce and the mails by sending and causing

1 mbbg

2 to be sent the matter hereinafter described to the persons
3 and addresses hereinafter set forth."

4 These are listed in the indictment as
5 Counts 2 through 11, each count sets forth a separate
6 mailing, and Count 2 the date is stated at "June 9, 1972,
7 the addressee George Nestory, 2 Sabo Court, East Paterson,
8 New Jersey, and the matter said to be mailed is confirma-
9 tion for 300 shares of EMC."

10 The other Counts 3 through 11 give approximate
11 dates of alleged mailing, the names of the addressees,
12 and describe the confirmations for various numbers of
13 shares of EMC stock. Since the confirmations themselves
14 are exhibits in the case, and since you may look at a
15 copy of the indictment during your deliberations if you
16 send out for it, and since the names and addresses coincide
17 with the confirmations, I think I will save time by not
18 reading them all at this time. If any juror wants them
19 read, however, I am prepared to do so.

20 Now with respect to the first element of
21 these Counts 2 through 11, and I say to you again each
22 count charges a separate crime and will be separately
23 determined by you, a scheme to defraud is any plan by
24 which one seeks to obtain money or property from another
25 by means of representations as to a material fact which are

1 mbbg

2 false and untrue. And such representations may be made
3 in two ways: First, by statements of material facts that
4 are just not true; and, second, by the omission from what
5 is stated of material facts that are necessary to make
6 what is said truthful and not misleading. In other words,
7 once having undertaken to state a fact or facts, there is
8 an obligation on the one who does so not to give such a
9 distorted picture of them as to make the statement mis-
10 leading concerning what the actual facts really are.
11 Sometimes a half-truth is no better than an outright
12 falsehood and a fraudulent misrepresentation may be effected
13 by knowingly and willfully telling a half-truth calculated
14 and intending to mislead.

15 It is sufficient to convict if the prosecution
16 proves beyond a reasonable doubt that at least one
17 material misrepresentation was made in furtherance of the
18 scheme to defraud in connection with the sale of EMC stock
19 to the public, and all of the allegations need not be
20 proved.

21 In this case the Government contends that the
22 offering circular, which I mentioned earlier, contained a
23 number of material misrepresentations and omissions.
24 These include the following: A section entitled "Use of
25 Proceeds" purporting to set forth how EMC proposed to

1 mbbg

2 spend the money it would receive from the sale of stock
3 to the public, and it's contended that it's not disclosed
4 in that section or anywhere else in the offering circular,
5 that the defendants Robert T. Loewy and Benjamin W. Loewy
6 would receive approximately \$25,000 on the closing of the
7 public offering, and approximately \$25,000 through
8 Corporate Advisory Council thereafter as management
9 consultants.

10 The offering circular, it is contended, did
11 not disclose the additional compensation promised to
12 Joseph L. DeFilippo in excess of the underwriting
13 commission reported in the offering circular in order to
14 induce DeFilippo to have Horizon underwrite the EMC public
15 offering.

16 That it didn't disclose that Milchman,
17 DeFilippo, Agostino and Rothman would divide \$50,000 from
18 the proceeds of the public stock sale. That it did not
19 disclose that defendants Benjamin W. Loewy, Robert T.
20 Loewy, Becker, Milchman and DeFilippo had agreed that the
21 after-market in EMC stock would be supported; and that it
22 stated -- that it contained a false statement as to Jack
23 Oxman and did not disclose that he was to give up 90 per
24 cent of his finder's fee to Corporate Advisory Council.

25 As to these counts, it's not necessary for the

mbbg

Government to establish that anyone relied on or suffered damages as a consequence of any false statements or omissions of material facts. It's enough if they were knowingly and willfully made in the expectation that they'd be relied on.

I have already defined the terms knowingly and willfully for you in connection with Count 1 and these terms have the same meaning in connection with all counts, and you must consider as to the second element whether, if this defendant participated in the scheme to defraud by means of the misrepresentations or course of conduct alleged, whether he did so knowingly and willfully. Guilty knowledge or knowing and willful conduct cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant. It is necessary that he possess the specific criminal intent to engage in the conduct alleged of a fraudulent nature.

Now the third element of the crime in these Counts 2 through 11 is what's generally called the jurisdictional element, and that consists of the use of mails or other means or instruments of interstate commerce or causing someone else to use the mails or such instrumentality.

It's not necessary for the Government to prove

1 mbbg

2 that this defendant actually received or placed in the
3 mail any of the confirmation slips specified in the
4 indictment.

5 It is sufficient for the Government to prove
6 that the defendant's actions caused a mailing to be made
7 in the ordinary course of business by somebody else which
8 mailing was made in furtherance of the scheme. If the
9 defendant took steps which would naturally and probably
10 result in the use of the mails, then he has caused the
11 mails to be used and the Government need not prove that
12 this defendant knew of or participated in the mailing of
13 the confirmations. And it's not necessary that the
14 confirmations themselves contained anything criminal or
15 objectionable or any misrepresentation of fact. The
16 matter may be innocuous in itself but it must be a
17 necessary part of the accomplishment of the alleged
18 scheme if you find there was such a scheme.

19 Also it's not necessary that the mailed
20 confirmation slips have to cross state lines. An intra-
21 state mailing within New York City would be sufficient.

22 Now, as I told you earlier in connection with
23 Counts 1 through 11, indeed also in connection with
24 Count 12, which I am coming to in a minute, the person may
25 be charged and found guilty of crime under the so-called

1 mbbg

2 aiding and abetting statute. Any person who commits the
3 acts that a statute declares to be a crime, of course
4 commits the crime. It's also a crime not only to commit
5 the illegal acts to which I have just referred, but to
6 cause aid, abet or procure or induce another person to
7 commit the crime and that is based on Section 2 of
8 Title 18 of the United States Code which says "(A), who-
9 ever commits an offense against the United States or
10 aids, abets, counsels, commands, induces, or procures its
11 commission, is punishable as a principal.

12 "(B). Whoever willfully causes an act to be
13 done which if directly performed by him or another, would
14 be an offense against the United States, is punishable
15 as a principal."

16 Thus anyone who does not commit the crime
17 but who aids and abets an offender or causes a crime to
18 be committed by someone else which if directly performed
19 by him would be a crime against the United States, is a
20 principal.

21 In other words, anyone who shares in the
22 specific criminal intent of the principal and is willfully
23 and knowingly associated with a venture in a way that by
24 his action he participates or assists in his bringing
25 about the ultimate result, is, under this section, in the

1 mbbg

2 same position as if he had done it all himself.

3 The Government contends that Benjamin Loewy
4 was a principal in the transactions described to you
5 along with others, and that Robert Loewy aided him in
6 those transactions, by preparing papers, delivering checks,
7 and attending meetings.

8 It's not necessary for a conviction of the
9 defendants on Counts 2 through 11 that you find that he
10 did every or even any act necessary to complete the
11 offense. Anyone who knowingly and willfully aided or
12 abetted or procured or induced another to commit an
13 illegal act and that other person did so, is himself
14 illegally committing that act along with the principal.

15 Now I will come to Count 12; which I will
16 read to you.

17 "The Grand Jury further charges from in or
18 about September 1972 up to and including the date of the
19 filing of this indictment, in the Southern District of
20 New York and elsewhere, Benjamin W. Loewy, Robert T. Loewy,
21 Alan S. Becker and Joseph L. DeFilippo, the defendants,
22 and other persons to the Grand Jury known and unknown,
23 unlawfully and knowingly did corruptly influence, obstruct
24 and impede and endeavor to influence, obstruct and impede
25 the due and proper administration of the law, to wit, the

mbbg

Federal Securities Laws, and related statutes, under which a proceeding was then being had before that agency of the United States, to wit, the Securities and Exchange Commission."

Now, the pertinent provisions of the statute pertaining to Count 12 read as follows, and that is Section 1505 of Title 18, United States Code:

"Whoever corruptly influences, obstructs or impeded or endeavors to influence, obstruct, or impede the due and proper administration of the law under which a proceeding is being had before a department or agency of the United States is guilty of aiding."

In order to find the defendant, Robert T. Loewy guilty of the crime charged in Count 12 of the indictment, you must find the following elements beyond a reasonable doubt; and here again the elements of this count are different because it's charged under a different statute:

First, that on or about the dates named in the indictment, that is, from in or about September 1972, up to and including June 2, 1977, a department or agency of the United States was conducting a proceeding under the laws of the United States. In this connection, I instruct you that an investigation conducted by the

1 mbbg

2 Securities and Exchange Commission, SEC, is a proceeding
3 before a department or agency of the United States; and
4 it has been stipulated that the Securities and Exchange
5 Commission was conducting an investigation into the
6 affairs of Ecological Manufacturing Corp., and that this
7 was properly authorized by the laws of the United States
8 and that they were calling in witnesses and taking testi-
9 mony.

10 Second, that the defendant Robert T. Loewy
11 had reasonable grounds for believing and did believe that
12 such a proceeding was taking place before the Securities
13 and Exchange Commission, and, third, that the defendant
14 Robert T. Loewy did corruptly endeavor to obstruct or
15 impede this proceeding by covering up payments from and
16 uses of the proceeds of the public offering of EMC stock,
17 which payments and uses had not been disclosed in the
18 offering circular for the public offering.

19 The word "corruptly," members of the jury,
20 encompasses any evil intent on the part of the defendant
21 to impede or obstruct the due administration of justice
22 in the SEC investigation of Ecological. This corrupt
23 intent needn't be the only motive for the defendant's
24 actions so long as you find it was one of the motives for
25 his actions. The purpose of the law is to prevent a

1 miscarriage of justice by corrupt methods and the statute
2 extends to any corrupt endeavor to obstruct or interfere
3 with the due administration of justice by the use of
4 trickery, schemes, or devices such as a cover-up or the
5 falsification of documents.
6

7 Count 12 also charges the defendant, under the
8 aiding and abetting statute and everything I told you
9 about the aiding and abetting statute in connection with
10 the securities fraud counts, is equally applicable to this
11 count, so if the defendant Robert T. Loewy knowingly
12 aided or abetted or procured or induced another person,
13 specifically Benjamin Loewy, to obstruct justice as
14 charged in Count 12 by fabricating documents to cover up
15 payments, then the defendant himself is guilty of committing
16 that illegal act also.

17 One who knowingly and willfully fabricates
18 documents such as checks or invoices or agreements or
19 marketing studies or bills and shows such fabricated
20 documents to the SEC in an attempt to impede that agency's
21 investigation into the true facts surrounding the public
22 offering and related subsequent transactions, has violated
23 Section 1505 of Title 18, United States Code, which I
24 stated to you; and the obstruction is said to consist in
25 the restructuring of documents involving use of the public

1 mbbg

2 offering proceeds, first as a loan, and later as a marketing
3 survey; and it's contended by the Government that this
4 was done in order to conceal from the SEC the fact that
5 the use of such proceeds were not as stated in the
6 offering circular. These contentions are in dispute,
7 and they are denied by the defendant, and he denies any
8 culpability with respect thereto, and presents a factual
9 question which is for your decision.

10 I am almost finished, members of the jury.
11 You have been very patient and attentive and I appreciate
12 it.

13 I am going to say one or two words to you
14 about deliberating.

15 Each juror is entitled to his or her own
16 opinion. Each of you should exchange your views with your
17 fellow jurors. That is what jury deliberation is; to
18 discuss and consider the evidence; to listen politely
19 and attentively to the opinion of the other jurors; and
20 to consult with one another and to express your own
21 individual views; and to discuss it together and to reach
22 a verdict, a just verdict, based solely and wholly on the
23 evidence.

24 Now each of you must decide the case for your-
25 self after this discussion with your fellow jurors; and

mbbg

1 you may not come in with any verdict which does violence
2 to your individual judgment as to how this case
3 ought to be decided. You should not cling to an opinion
4 you may hold if after discussion with the other jurors
5 your opinion appears erroneous in the light of the dis-
6 cussion viewed against the evidence and the law.
7

8 However, if after carefully weighing all the
9 evidence and listening to the arguments of your fellow
10 jurors, you entertain a conscientious view that differs
11 from the rest, you are not to give up your own judgment
12 as to how this case ought to be decided and to go along
13 simply because you are outnumbered or outweighed. The
14 final vote of each juror must reflect his or her con-
15 scientious individual judgment as to how each count in
16 this case ought to be fairly decided.

17 In order to find a verdict, it must be
18 unanimous. That is to say, all twelve jurors must agree
19 in order to decide this case as to any count; and the
20 Court will take a separate verdict of you as to each
21 count 1 through 12.

22 Under your oath as jurors, you cannot allow
23 any consideration of the punishment or possible sentence
24 which might be inflicted upon the defendant if convicted
25 to influence your verdict in any way or in any sense to

1 mbbg

2 enter into your deliberations. The duty of imposing
3 sentence rests exclusively with the Court and your function
4 is to weigh the evidence in the case and to determine
5 whether or not the Government has proved the defendant's
6 guilt beyond a reasonable doubt, as to each count
7 separately solely upon the basis of the evidence and the
8 law.

9 You are to decide the case on the evidence
10 and the evidence alone and you mustn't be influenced by
11 any assumption or conjecture or sympathy or any inference
12 not warranted by the fact.

13 If you fail to find beyond a reasonable doubt
14 that the law has been violated, you shouldn't hesitate
15 for any reason to find a verdict of not guilty.

16 On the other hand, if you should find that
17 the law has been violated as charged, you shouldn't
18 hesitate because of sympathy or any other reason to render
19 a verdict of guilty as a clear warning that a crime of
20 this character cannot be committed with impunity; and the
21 public is entitled to be assured of this.

22 While you are deliberating you might desire
23 to have the exhibits to look at them or a copy of the
24 indictment to look at. If you want anything like that,
25 send out a note, the foreman will sign all notes, Say in

1 mbbg

2 the note what it is that the jury wants. If you want all
3 the exhibits or you want a particular exhibit, you can
4 identify it and it will be sent into the jury room.

5 You might desire to have some part of the
6 testimony read to you or you might find that you are un-
7 certain as to the meaning of some part of my instructions,
8 and if anything like that occurs, the foreman will send
9 out a note asking for whatever will clear up the questions
10 you might have. Now, don't ask that the testimony be
11 read until you have discussed it with each other and see
12 if your collective recollection is sufficient and you
13 don't need it. But if you do have to have something read,
14 of course, I will make myself available to read it to you.

15 I want to make another thing very clear. In
16 sending out notes, please do not indicate in your note
17 how the jury may then be divided, how many feel this way
18 or how many feel that way. It's not proper to put in any
19 note and please don't do that.

20 All notes will be signed by the foreman and
21 when the jury has reached its verdicts, the foreman will
22 tell the U.S. Marshal that the jury has reached its
23 verdicts and then the jury will be brought out into court
24 to give your verdict in open court.

25 Your oath sums up your duty and that is

1 mbbg

2 without fear or favor to anyone; justly and fairly and
3 truly try the issues between this defendant and the
4 Government of the United States and give a just and fair
5 verdict solely upon the evidence and following the Court's
6 instructions as to the law. It's important to the
7 defendant, it's important to the Government. It's
8 important to you.

9 At this time, Mr. Cloidt, will you please
10 swear the marshal.

11 (A marshal was duly sworn.)

12 THE COURT: At this time Mrs. Carpenter and
13 Miss Garcia, it turns out that we won't need you because
14 all of our jurors have stayed in good health and nobody
15 has to be excused, and we only need twelve for delibera-
16 tions, so at this time you are each excused with the
17 thanks of the Court, and I have several things to say to
18 you.

19 First, when you leave here, go to Room 109
20 and tell the jury clerk that you have been excused.

21 Secondly, do not discuss this case with any-
22 body on the jury or any of the attorneys or anybody else
23 until after the verdict has been filed. Please don't
24 express any opinion of your own as to how you would have
25 decided the case. Just don't say anything about it until

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

mbbg

485

it's over. If you formed any friendship with any of these other jurors during your time together, don't telephone, don't talk to each other until their work is done. That might not be today, their deliberations might continue into tomorrow, so please don't do that.

I have appreciated your prompt attendance. You are each excused with the thanks of the Court, the two alternates, and the two alternates may go to Room 109 at this time.

The rest of you, I ask you to remain where you are briefly and not to discuss the case because I am going to confer with the attorneys in the next room and see if there is anything which I may not have covered in my previous statement to you.

(In the robing room.)

THE COURT: I will begin with you, Mr. Vizcarrondo.

Do you have any additional requests or exceptions?

MR. VIZCARRONDO: No, your Honor.

THE COURT: Defendant?

MR. HOLLMAN: Your Honor, I think we have just one exception. It concerns the charge on the Section 1505 count, the obstruction of justice count.

mbbg

1
2 I think that may be required and should be
3 required of the law that to convict under that count a
4 defendant should either be aware that the SEC has an
5 intention of obtaining those particular documents that
6 may be altered or covered up, or that there should be
7 some type of subpoena either about to be served or served
8 upon the defendant that he knows of so that he can be
9 aware that that particular document is one that is in
10 issue with regard to the SEC proceedings; and I don't
11 think the evidence produced by the Government here covers
12 that type of proof, and it's on that area that I would
13 take an exception.

14 THE COURT: Do you have a particular request
15 for further amplification on that point? If so, I might
16 go into that. I think the document need not be under
17 subpoena, but the person, in fabricating the document or
18 in covering up the transaction, must intend thereby to
19 impede the investigation, and must have in his mind the
20 likelihood or possibility that if he doesn't cover it up,
21 it will come to light.

22 Now, I'd be willing to so instruct the jury, and
23 I will take any suggested language that you may have. I
24 think it's certainly implicit in what we have told them.
25 He has to have a specific criminal intent to obstruct the

1 mbbg

2 investigation, and it would be illogical to suggest that
3 a person would fabricate a document if it didn't have
4 that purpose.

5 MR. VIZCARRONDO: Your Honor, I believe
6 that your statement of the law is correct and Mr. Hollman's
7 is incorrect, and I believe that as you charged the jury,
8 it covers the correct statement of the law more than
9 amply.

10 THE COURT: Just covering up or fabricating
11 isn't sufficient. He must intend thereby to make the
12 investigation more difficult.

13 MR. VIZCARRONDO: That's correct, he must
14 be aware of the investigation, as your Honor charged, and
15 he must have taken his actions in order to corruptly
16 impede or obstruct that investigation. He does not have
17 to be aware of a subpoena being issued.

18 THE COURT: I will modify the instructions
19 slightly. If you have particular language you want me
20 to use, I will take it.

21 MR. HOLLMAN: No, I have no further language.
22 Just my exception.

23 THE COURT: I will give you an exception
24 as to that and I will correct it. Anything else?

25 MR. HOLLMAN: That's all, your Honor.

(In open court, jury present.)

THE COURT: Members of the jury, there is one additional point in connection with Count 12 which I want to make completely clear and emphasize to you. It is an essential element of that crime that by covering up or fabricating papers or aiding and abetting in doing so, if he did do any of that, that the defendant must have had the specific criminal intent to obstruct or impede the investigation of the SEC.

That must have been his purpose in doing whatever he did do. It is not a violation of this particular statute merely to cover up or fabricate documents or alter the appearance of the records of Ecological. It would not be criminal under this indictment as charged here unless in doing whatever you find he did, he had the specific criminal intent of making it harder for the SEC to complete its investigation or reach the true facts in the matter.

That is what the word "impede" means, to obstruct or stop or prevent or delay, and it's essential that his purpose in doing any alleged cover-up should be directly related to documents or matters which he thought at the time would become a part of the SEC investigation, and would be brought out as part of its inquiry.

If there are any further requests, I will take

1 mbbg

2 them at the side bar, gentlemen.

3 MR. VIZCARRONDO: No, your Honor.

4 MR. HOLLMAN: No, your Honor.

5 MR. BYRNE: No, your Honor.

6 THE COURT: All right. One more thing,
7 members of the jury. You will probably go to lunch very
8 shortly. Do not discuss the case in a public restaurant.
9 Talk with each other only in the jury room about the case
10 when everybody is present and everybody can participate
11 equally in the discussion.

12 The jury may now withdraw in the custody of
13 the U.S. Marshal.

14 (The jury retired to commence their
15 deliberations.)

16 THE COURT: Do you have an understanding,
17 gentlemen, that if the clerk receives a note merely
18 relating to exhibits that is clear enough to comply with,
19 that it's all right to comply without the necessity of
20 reconvening?

21 MR. VIZCARRONDO: Yes, your Honor.

22 MR. HOLLMAN: Yes, your Honor.

23 THE COURT: Would you kindly give the clerk
24 the exhibits in the proper order.

25 (Luncheon recess.)

(3:45 p.m., in open court, jury
not present.)

xxx (Note from jury marked Court Exhibit 3.)

THE COURT: Gentlemen, we have a note which
has been marked Court Exhibit 3. I believe you have
already seen it. The first two items requested in the note
have been complied with, and the Court would appreciate
your advice or requests as to how to comply with Number 3.

May I see the checks they are referring to in
Number 3?

MR. VIZCARRONDO: Certainly, your Honor.

THE COURT: Any of you want to be heard
about this?

MR. HOLLMAN: Your Honor, there really are
no checks they are referring to. There are no endorse-
ments by either one of the Loewys.

THE COURT: On any checks?

MR. HOLLMAN: On any checks. All they can
be advised is there are no such endorsements. The endorse-
ments are by Corporate Advisory.

THE COURT: The checks are endorsed by
Corporate Advisory?

MR. VIZCARRONDO: Yes, your Honor, they are
all made payable to Corporate Advisory and endorsed by

1 mbbg

2 Corporate Advisory Council.

3 THE COURT: Is it satisfactory to both of
4 you if I tell them that?

5 MR. HOLLMAN: Yes, your Honor.

6 MR. VIZCARRONDO: Yes, your Honor.

7 THE COURT: They are endorsed by means of a
8 rubber stamp?

9 MR. VIZCARRONDO: Yes, your Honor.

10 THE COURT: If that is agreeable, I will
11 tell them.

12 MR. HOLLMAN: It's agreeable.

13 THE COURT: If they want to see any, they
14 can send for any check they want to see. They are payable
15 to Corporate Advisory Council?

16 MR. VIZCARRONDO: That's correct, your Honor.

17 THE COURT: Not Cor-Ad-Co?

18 MR. VIZCARRONDO: One is made payable to
19 Cor-Ad-Co. The rest are Corporate Advisory Council.

20 (In open court, jury present.)

21 THE COURT: Members of the jury, the Court
22 has your note which has been marked Court's Exhibit 3; and
23 the first two items in your note have been complied with.

24 As to the third item, I now wish to advise
25 you that all checks which are in evidence in this case are

1 mbbg

2 payable either to Corporate Advisory Council or to
3 Cor-Ad-Co, Inc. and they are all endorsed by a rubber stamp.
4 Now, if you want to see any of those checks, or if you want
5 to see all of them, you can send out another note telling
6 the Court what you'd like to have and that will be pro-
7 vided; but that is my response to Item 3 of your note,
8 and as I said before, I believe the clerk has already sent
9 in the materials requested in Items 1 and 2.

10 You may resume your deliberations.

11 (The jury again retired to continue
12 their deliberations.)

13 MR. VIZCARRONDO: Your Honor, I have had
14 marked as Court's Exhibit 4 a list of 3500 material I
15 provided to the defendant in this case, and I ask that it
16 be made part of the record.

17 THE COURT: Have you shown it to counsel?

18 MR. HOLLMAN: Yes, he has, your Honor. I
19 have a copy. No objection,

20 THE COURT: All right, so ordered. We will
21 be in recess, gentlemen. Stand by.

22 (Recess.)

23 (5:45 p.m., in open court, jury not
24 present.)

25 THE COURT: Gentlemen, it's now around a

1 mbbg

2 quarter to six and I propose to send a note into the jury
3 room which would read as follows. Members of the jury,
4 the Court is willing to stay as long as you wish, or if
5 you desire, the Court is prepared to recess and resume at
6 9:30 tomorrow morning. Please let me know your wishes.

7 Is there any objection to that or any comments
8 or suggestions?

9 MR. HOLLMAN: Your Honor, I think it's under-
10 stood that the jury will return to their homes.

11 THE COURT: Yes.

12 MR. HOLLMAN: Fine.

13 THE COURT: Do you want me to put that in?

14 MR. HOLLMAN: I think it's probably -- I
15 don't think they would know the difference. I am just
16 worried about their thinking they are being sequestered
17 tonight.

18 THE COURT: I will put in, "Return to your
19 homes."

20 MR. VIZCARRONDO: We have no objection.

21 MR. HOLLMAN: I have no objection, your
22 Honor.

23 THE COURT: All right,

24 (Court Exhibit 5 marked.)

25 (Pause.)

1 mbbg

2 THE COURT: I have a note from the jurors.

3 "We, the members of the jury, do wish to recess now and
4 are prepared to resume conference at 9:30 tomorrow morning."

5 And the note says P.S. Exhibits 2, 7 and 5 are returned.

6 Please bring in the jury.

xxx 7 (Court Exhibit 6 marked.)

8 (Jury present.)

9 THE COURT: Members of the jury, in
10 accordance with your wishes, I am about to recess for the
11 day. Before I do so, I want to leave you with a couple of
12 thoughts.

13 Number one, when you return to your homes,
14 don't discuss this case with anybody; and do not read
15 anything or hear anything or speak to anybody that has any-
16 thing to do with the case or that is involved in the case
17 in any way whatever; and keep your mind free from any
18 possible extraneous material, because jurors decide cases
19 only on what takes place in the courtroom. It's not
20 proper for you to discuss it with anybody, that includes
21 the members of your families.

22 Secondly, please return at 9:30 o'clock
23 tomorrow morning promptly and assemble directly in that
24 jury room; and it's essential that all of you be here
25 because it requires twelve jurors to decide a case; and

1 mbbg

2 please do not start discussing the case until every juror
3 is present, because it's essential that all jurors
4 participate equally in the discussion. So until everybody
5 is there, don't start to work.

6 Please all of you try to be on time because
7 as soon as you are all there you can start doing your work.
8 The clerk will come in and take attendance.

9 All right, you are now excused for the balance
10 of today. Please come back 9:30 tomorrow morning.

11 Don't discuss the case in the meantime. You
12 may withdraw from the courtroom.

13 (The jury left the courtroom.)

14 THE COURT: I will be in recess. I am going
15 to ask you all just to take a minute or two until the
16 clerk informs you that the jurors have left. We will
17 resume at 9:30 tomorrow.

18 (An adjournment was taken to Wednesday,
19 September 21, 1977, at 9:30 a.m.)
20
21
22
23
24
25

1 mbbg

2 UNITED STATES OF AMERICA

3 vs.

77 cr. 411

4 ROBERT T. LOEWY

5 September 21, 1977

9:30 a.m.

6 * * * *

7 Trial resumed.

8 * * * *

9
10 (11 a.m., in open court, jury not
11 present.)

12 THE COURT: Counsel have seen Court's
13 Exhibits 7, 8, and 9 which I am about to comply with.

14 (Jury present..)

15 THE COURT: Good morning, members of the
16 jury.

17 I have your three separate notes, and I will
18 deal with them in no particular order.

19 One of the notes says, "If defendant is guilty
20 of Count 12, obstruction, does that make him guilty of
21 conspiracy?"

22 The answer to that question is no. If that
23 were so, the two would be combined in one count, and they
24 are not. And if you remember, I told you that each count
25 calls for a separate verdict on your part, and one count,

1 mbbg

2 the conspiracy count, Count 1 charges the violation of
3 one Federal statute, and the Count 12, the so-called
4 obstruction count, for obstructing, impeding the investi-
5 gation of the SEC, charges a violation of a different
6 statute. Every Federal crime arises under a particular
7 statute. You will recall that I told you you don't need
8 to remember the numbers of the statutes, but I did give
9 you the numbers, and each one has separate elements, two
10 or more elements, depending on the case. And to warrant
11 a conviction under a particular statute, the Government
12 must prove beyond a reasonable doubt each of those elements,
13 and I did read you the separate elements of Count 12, and
14 the separate elements of the crime of conspiracy in
15 Count 1.

16 I would be entirely willing to repeat those
17 elements in respect to Count 12 if it's helpful to the jury,
18 and if you send out a note and ask me for it.

19 Now, I think perhaps this note arises from
20 the fact that an argument was made by the Government, and
21 it's an argument, whether that argument or any other argu-
22 ment has any weight or significance is entirely a matter
23 for you jurors to decide. It is an argument that was
24 made if the defendant obstructed the SEC inquiry and he
25 did so knowingly and willfully, that that might have some

1 mbbg

2 bearing on his intentions in connection with Count 1.
3 It's possible to argue that if he did so, that that was
4 independent evidence of his state of mind with respect to
5 the conspiracy, or that it showed consciousness of guilt
6 on his part in connection with the conspiracy and a desire
7 to cover it up. Whether that is a valid argument is
8 entirely for you to decide, is for you to decide.

9 It's also a reasonable argument to suggest
10 that he was perhaps merely doing so to protect the
11 interests of his father or Mr. Becker or somebody else,
12 if he was doing so.

13 As I said before, they all call for factual
14 conclusions. A person's intention is a question of fact,
15 and it's entirely for you to determine, but I must
16 reiterate, you decide each count separately in accordance
17 with the proof bearing on the elements of the particular
18 crime which is charged in that count; and the fact that a
19 person might be guilty of Count 1 in an indictment would
20 not automatically by itself make him guilty of Count 12
21 or vice versa. Each one must be decided separately.

22 If I haven't answered your question fully and
23 you want the elements of Count 12 read to you again, as
24 I said earlier, send out a note and just ask me for that.

25 Now I will deal with the other note which

1 mbbg

2 asks for the definition of conspiracy and conspirator.

3 Now I think I might begin by restating the
4 three elements of the crime of conspiracy, each of which
5 must be established beyond a reasonable doubt before any-
6 one may be convicted of that crime; and they were, in the
7 context of this case, first, that sometime between
8 December 1, 1970 and June 2, 1977, an agreement or con-
9 spiracy as charged in the indictment for the illegal
10 purposes mentioned therein existed between two or more
11 of the defendants or named conspirators in that indict-
12 ment. In other words, that any two or more of them agreed
13 to accomplish the illegal objects mentioned therein, by
14 the means mentioned therein.

15 The second element which would have to be
16 proved beyond a reasonable doubt in this case is that this
17 defendant, Robert T. Loewy, who is on trial before you,
18 knowingly and willfully associated himself with the
19 conspiracy; with this conspiracy, if there was one; that
20 is, that he became a member of it.

21 And the third element which must be proved is
22 that one of the conspirators, and it doesn't have to be
23 this defendant, knowingly committed at least one of the
24 overt acts set forth in the indictment at or about the
25 time and place alleged, and that it happened in the

1 mbbg

2 Southern District of New York, which includes Manhattan,
3 as you all know.

4 Now, I explained to you that a conspiracy
5 is a combination or agreement of two or more persons by
6 joint or concerted action, to accomplish a criminal or
7 unlawful purpose; and in this case, the purpose charged
8 is violation of the Federal Securities Laws, which I
9 explained to you in connection with the substantive counts
10 2 through 11 inclusive.

11 I mentioned to you before, and I repeat, that
12 the gist of the crime of conspiracy is the unlawful agree-
13 ment or combination of persons to violate the law together;
14 and whether or not they accomplish what it's alleged they
15 conspired to do has no bearing on the question of guilt
16 or innocence. A conspiracy is sometimes a partnership,
17 called a partnership in a criminal venture, and I think
18 I did tell you that it was sufficient to prove the
19 existence of a conspiracy if two or more persons in any
20 manner through any contrivance impliedly or tacitly
21 come to a common understanding to violate the law together,
22 express language or specific words are not required to
23 indicate assent to or attachment to a conspiracy; and you
24 can judge the acts and conduct of the conspirators to
25 ascertain whether a conspiracy came into existence as

1 mbbg

2 charged.

3 I pointed out to you that the offense is
4 complete when the unlawful agreement is made and any
5 single overt act to effect the object of the conspiracy
6 is thereafter committed by at least one of the conspirators,
7 and the success or failure of it is of no significance
8 insofar as that particular charge is concerned.

9 I informed you further that in order to find
10 that this defendant was a member of the conspiracy, that
11 is the second element, you must find that he knowingly
12 and intentionally or willfully participated therein. I
13 instructed you that mere knowledge of the existence of the
14 conspiracy or mere knowledge of any illegal act on the
15 part of other alleged conspirators or mere association
16 with one or more of them is not sufficient to establish
17 membership.

18 What is necessary is that the defendant
19 participated with knowledge of at least some of the purposes
20 of the conspiracy, and with intent to aid in the accomplish-
21 ment of those unlawful ends, and with the intention of
22 making it something that would succeed or with the
23 intention of having or enjoying the benefit of a stake in
24 the outcome, or a benefit from the accomplishment of the
25 purposes of the conspiracy.

1 mbbg

2 Now I defined knowingly and willfully for you.
3 I would repeat that definition if you have any doubt about
4 it, and you can send out another not .

5 I did explain to you that in a conspiracy just
6 as in any business partnership, it's perfectly legal for
7 ordinary business purposes, different people will perform
8 different activities, and guilt is not measured by the
9 relative standing or the nature of the partnership
10 activities entrusted to a particular partner, but before
11 a person may be found to be a member of a conspiracy, it
12 must be shown beyond a reasonable doubt that he knowingly
13 and willfully acted in furtherance of the illegal purposes
14 charged, and made the venture something which he wished
15 to succeed.

16 I did explain overt acts, that is any step
17 take to achieve or accomplish or further the objective
18 of the conspiracy. It can be a perfectly permissible or
19 lawful act in itself, and it's an essential element of the
20 crime because people might agree to violate the law
21 together, and then do nothing about it; and if they did
22 nothing to further their illegal agreement, that would
23 not be a crime, that would only be talk, and the law doesn't
24 extend to mere illegal agreements that don't result in
25 anybody doing anything, but if an agreement is reached,

1 mbbg

2 and then a member of the conspiracy does something towards
3 furthering it, something overt, and overt means open or
4 observable, then that element will be satisfied, and an
5 overt act doesn't need to be a criminal act in itself;
6 and they don't have to prove all of the overt acts. It's
7 sufficient if one took place.

8 Now I trust that I have covered in substance
9 my definitions previously given to you. I am ready here
10 at all times to answer any questions like this that you
11 have, and I urge you if you have any problem with any of
12 those matters, don't hesitate to write another note.

13 By the same token, I don't want to volunteer
14 unnecessary information to you, so I am trying to confine
15 my responses to what I consider your note covered, but if
16 your note was meant to cover more, or if you have other
17 or additional or further questions, please go through the
18 same procedure and sent out a note.

19 Now the last note which I will deal with at
20 this time, you asked for Mr. Milchman's testimony, and
21 Mr. Birnbaum will read Mr. Milchman's testimony to you from
22 his tapes.

23 (Testimony of Milchman read.)

24 THE COURT: Members of the jury, please
25 return to the jury room and continue your deliberations.

1 mbbg

2 (At 11:50 a.m., the jury again retired
3 to continue their deliberations.)

4 (In open court, jury not present.)

5 THE COURT: We have a note. The note says,
6 "The members of the jury have come to an agreement on
7 Count 12 but still are unable to come to an agreement on
8 Counts 1 and 2 through 11. It is our feeling that further
9 deliberation would still show no change in the outcome of
10 our tally."

11 I think I will take a verdict on Count 12 at
12 this time.

xxx 13 (Court Exhibit 10 marked.)

14 (Jury present.)

15 THE COURT: Members of the jury, I have
16 received a note. I will read the note to you. "The
17 members of the jury have come to an agreement on Count 12
18 but still are unable to come to an agreement on Counts 1
19 and 2 through 11. It is our feeling that further
20 deliberation would still show no change in the outcome of
21 our tally."

22 Now, members of the jury, so I make no mistake
23 about it and understand it fully, are you all prepared to
24 announce a final and irrevocable verdict as to Count 12?
25 You are all fully agreed on Count 12?

1 mbbg

2 (Jurors responded in the affirmative.)

3 THE COURT: All right, I will permit the
4 clerk to take a verdict on Count 12 at this time.

5 THE CLERK: Madam Forelady, what is your
6 verdict as to Count 12?

7 THE FORELADY: Judge Bricant, defending
8 attorney and prosecuting attorney, it's guilty to Count 12.

9 THE COURT: You may be seated.

10 THE CLERK: Members of the jury, listen to
11 your verdict as it stands recorded. You say you find the
12 defendant guilty on Count 12.

13 Miss Moats, is that your verdict?

14 THE FORELADY: Yes, it is.

15 THE CLERK: Mr. Santiago, is that your verdict?

16 JUROR NO. 2: Yes.

17 THE CLERK: Mrs. Giliberto, is that your
18 verdict?

19 JUROR NO. 3: Yes.

20 THE CLERK: Mr. Caughman, is that your
21 verdict?

22 JUROR NO. 4: Yes.

23 THE CLERK: Mrs. Rogan, is that your verdict?

24 JUROR NO. 5: Yes.

25 THE CLERK: Miss Montelcone, is that your

1 mbbg

2 verdict?

3 JUROR NO. 6: Yes.

4 THE CLERK: Mr. DeNardo, is that your verdict?

5 JUROR NO. 7: Yes.

6 THE CLERK: Mr. Basilotta, is that your

7 verdict?

8 JUROR NO. 8: Yes.

9 THE CLERK: Mr. Baker, is that your verdict?

10 JUROR NO. 9: Yes.

11 THE CLERK: Mrs. Grinage, is that your

12 verdict?

13 JUROR NO. 10: Yes.

14 THE CLERK: Mr. Rispule, is that your verdict?

15 JUROR NO. 11: Yes.

16 THE CLERK: Mr. Serafin, is that your verdict?

17 JUROR NO. 12: Right.

18 THE COURT: I will direct the clerk to

19 record the partial verdict on Count 12 at this time. I

20 am going to ask the jurors briefly to return to the jury

21 room for a very short period while I consider what

22 proceedings, if any, should follow from this point on with

23 respect to the balance of the case; so would you just

24 return to the jury room briefly.

25 (The jury left the courtroom.)

1 mbbg

2 THE COURT: What do counsel wish to do at
3 this point?

4 MR. VIZCARRONDO: Your Honor, the Government
5 asks that the Court instruct the jury to continue their
6 deliberations on the first eleven counts.

7 MR. HOLLMAN: Your Honor, I think the note
8 from the jury is very clear that they have considered
9 this and are obviously an intelligent jury, they have
10 considered the matter and simply can't reach a verdict on
11 the situation. It seems to me the Government should be
12 satisfied with a guilty verdict on one count.

13 MR. VIZCARRONDO: Our problem, your Honor,
14 is that if for some reason the conviction --

15 THE COURT: Let me understand clearly what
16 defense counsel says.

17 Are you moving for a mistrial?

18 MR. HOLLMAN: No, your Honor, I am not
19 moving for a mistrial.

20 THE COURT: You see, that presents me with
21 a difficulty, because I am very mindful of Kipling's
22 famous observation, "It matters not to the soldier if you
23 die at Waterloo or at a border skirmish" and a person who
24 is a convicted Federal felon on one count is a convicted
25 Federal felon with about the same total effect as if he

1 mbbg

2 had been convicted on fifteen counts. By the same token,
3 if he beats Count 12 on appeal or in a post-verdict
4 motion of some kind, it seems only fair and reasonable
5 that the Government should have a crack at the entire
6 matter if there is a new trial. That's the problem that
7 presents itself.

8 MR. HOLLMAN: Could we consult just for a
9 moment?

10 THE COURT: Indeed you may.

11 (Pause.)

12 MR. HOLLMAN: Your Honor, I believe you set
13 forth the situation in a very fair manner, and I think in
14 fairness to the Court and the Government as well as this
15 defendant, we will move for a mistrial at this time.

16 THE COURT: I don't see why I shouldn't
17 grant it under all the circumstances of this case. The
18 jury has been a particularly sincere and dedicated jury.
19 They have gone at their work in a conscientious manner.
20 They listened carefully. I don't know why I can't take
21 them at their word.

22 MR. VIZCARRONDO: Your Honor, we do oppose
23 a mistrial at this time. They have not been deliberating
24 that long, and --

25 THE COURT: But you see it's a relatively

1 mbbg

2 simple case. It really depends on the difficulties which
3 are inherent in Becker's testimony whether this was
4 primarily the work of Benjamin Loewy and this defendant was
5 merely a bystander and gopher on the conspiracy count,
6 or whether he really was a knowing and willful participant.
7 And I can see how some jurors could have a conscientious
8 difficulty with it and I don't see any need to give any
9 partially coercive instructions though the circuit now
10 allows the Allen charge to be given twice in a trial, and
11 they allowed that in an en banc decision, but I really
12 don't see the virtue of it.

13 I assume you aren't going to insist on a re-
14 trial in sixty days, are you?

15 MR. HOLLMAN: No, your Honor.

16 THE COURT: All right. If Count 12 doesn't
17 stick on appeal, come back and try the whole thing before
18 some other judge. I think that's fair.

19 MR. VIZCARRONDO: I understand what your
20 Honor is saying.

21 THE COURT: He has no felony record, has he,
22 Mr. Hollman?

23 MR. HOLLMAN: No, your Honor, no record at
24 all.

25 THE COURT: No prior record?

1 mbbg

2 MR. HOLLMAN: No prior record.

3 THE COURT: What can I tell you?

4 MR. VIZCARRONDO: I understand what your
5 Honor says. We do oppose the mistrial at this time.

6 THE COURT: All right, I will grant the
7 motion.

8 Bring back the jury so I can excuse them.

9 (12:00 p.m., jury present.)

10 THE COURT: Members of the jury, I have been
11 considering the note that you have given, and I am taking
12 your note at face value, that you have expressed through
13 your foreman to the Court the opinion that further
14 deliberation would not result in a change of opinion which
15 would permit you to agree on the other eleven counts.
16 For that reason, and relying on the good faith of your
17 note, I have under advisement this motion for a mistrial.

18 Is there anyone who disagrees with the con-
19 tention in the note that you are deadlocked on the other
20 counts? Any juror who thinks that further discussion
21 would lead to a unanimous verdict?

22 All right. I am declaring a mistrial as to
23 those counts.

24 At this time, I want to thank you for your
25 conscientious attendance here. I appreciate particularly

mbbg

511

1 the fact that you came on time and your work as jurors is
2 now finished. The clerk has your certificates of service
3 which he will give you as you leave; and are excused*with
4 the thanks of the Court.
5

6 I would tell you also at this time that while
7 you are released from my direction that you can discuss
8 the case, by the same token, although you have your rights
9 of free speech and can say anything you want to anybody,
10 nobody can require you to discuss the case or to tell
11 them what your reasonings were or how many of you stood
12 this way or how many of you stood that way. You are
13 under no duty or compulsion to talk to anybody about this
14 trial. I generally tell jurors that you may feel better
15 if you don't do so, put it behind you and go on to the
16 future. By the same token, if anybody should try to
17 harass you or bother you in any way in connection with
18 this case whatsoever, don't put up with it, and immediately
19 call that to the attention of the chief judge of this
20 court.

21 All right, you are excused with the thanks
22 of the Court. Mr. Cloidt has your certificate which he
23 will give you on the way out, and you don't have to come
back for the balance of the week.

25 All right, you may withdraw from the court-

1 mbbg

2 room.

3 (The jurors left the courtroom.)

4 THE COURT: I direct that a full pre-
5 sentence investigation be made by the United States
6 Probation Officer as to Count 12, and I will give you a
7 date to come back: October 14 at 9:30.

8 Defendant is continued on his existing bail.

9 MR. HOLLMAN: Just one thing, your Honor.
10 I believe, am I right, that Benjamin Loewy is scheduled
11 for the same day?

12 THE COURT: Yes.

13 MR. HOLLMAN: The only thing I have, of
14 course, is my motion to set aside the verdict on the
15 grounds it is contrary to the weight of the evidence.

16 THE COURT: I don't think it's contrary to
17 the weight of the evidence. I think it's strictly a
18 question of credibility and what inferences they drew from
19 all of the facts as to his intent and --

20 MR. HOLLMAN: I wanted the motion on the
21 record.

22 THE COURT: Yes, all right. The motion is
23 denied.

24 If there is any specific matter in connection
25 with it that you want to call my attention to when you

mbbg

513

get your trial record, of course you can do that, but I regard it as purely a fact question which the jury had a right to resolve, and I think they went at it in a fair and considerate manner.

All right. I will make a finding on the record that the interests of justice don't require that he be retried within sixty days, because your appeal won't be heard within that time.

MR. HOLLMAN: Your Honor, the defendant will not make any attempt to have a trial before any period.

THE COURT: It wouldn't be before me anyway.

MR. HOLLMAN: That's right.

THE COURT: All right.

MR. VIZCARRONDO: Thank you, your Honor.

MR. HOLLMAN: Thank you.

THE COURT: All right.

(Trial concluded.)

* * * *

ROSENTHAL

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 19 day of Jan., 1978 ~~2077~~ deponent served the within *Appendix* upon

U.S. Atty., So. Dist. of NY

attorney(s) for
Appellee

In this action, at
1 St. Andrews Pl., NYC

the address(es) designated by said attorney(s) for that purpose by depositing
1 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this 19 day
of Jan., , ~~1977~~ 1978

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

